

# JURAL RELATIONS

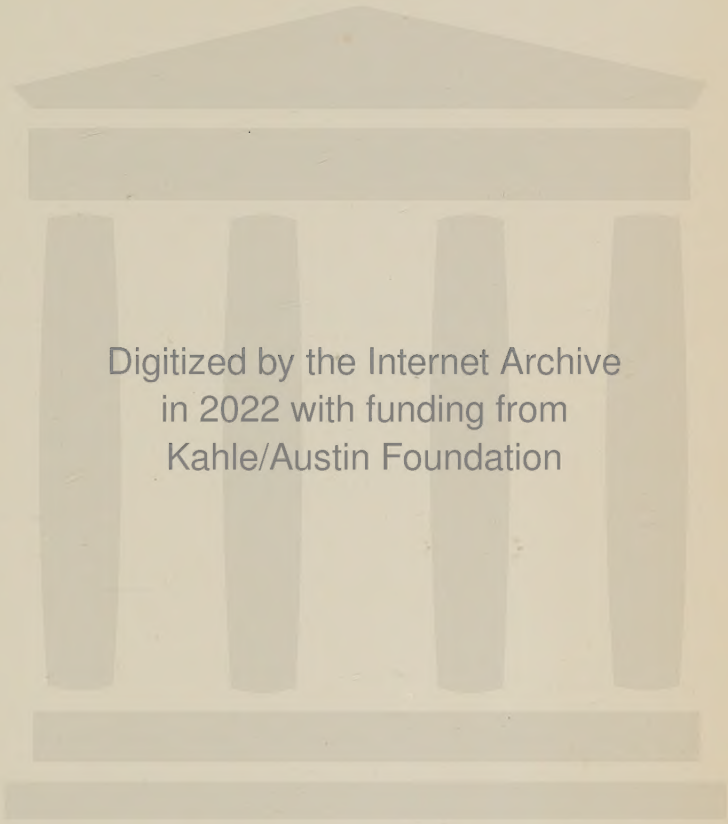


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# JURAL RELATIONS

By

ALBERT KOCOUREK

Professor of Law at Northwestern University

WITH AN INTRODUCTION BY

JOHN H WIGMORE

Dean of the Faculty of Law and Professor of Law  
at Northwestern University

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## AUTHOR'S PREFACE

This work under the title, "Jural Relations," deals with topics usually discussed in treatises on 'Jurisprudence.' More specifically, it deals chiefly with the jurisprudence topic of 'Rights.'

The idea of jural relation is as fundamental for legal phenomena as is the idea of gravitation for physical phenomena. The pervasiveness of the idea of jural relation and the uniformity of its operation have obscured its existence; its obviousness has assisted to conceal it. Another reason for the many centuries of neglect of this leading idea is that jural relationship is purely conceptual; it is not apparent to the senses. It is natural that in legal phenomena attention should have been attracted to jural facts—which are the causes of jural relations—rather than to jural relations, themselves, since these facts have a basis in physical nature and make a direct appeal to the senses.

We have been unaware of the existence of jural relations just as the savage is unaware of gravitational force. The savage knows the objects of the outer world and knows that if an object is picked up from the ground it will return again to the earth when released from the hand. If the savage man inquired (as is improbable) why the stone falls, he may perhaps have given the same answer that the lay explanation of our own age gives—the stone falls because it is heavy—thinking that he has said all that there is to be said on so simple a matter. If he should be asked why the stone is heavy, he might answer, disdainfully, that such is the nature of stones.

It is not an exaggeration to say that many of our legal explanations are as naïve as the savage's explanation of gravitation. The law is filled with anesthetic explanations and anesthetic words. They conceal the pain of thought, but they must be resorted to again and again because there is something persistent about truth; it is a fury that gives no rest and it exacts a heavy penalty of any society that seeks to put it down. There

is hardly any department of the law, perhaps there is none, that is free from the struggle with this principle. We refer here only to one species of this struggle—the logical struggle for ideas. So long as the ideas upon which legal results turn are nebulous and unstable or imperfect and incoherent, society must pay a heavy cost, not to be estimated, for its legal system.

If the idea of jural relation is basic for legal phenomena, how has it been possible to avoid recognition of its importance? The answer is that it has been accomplished by a logical ellipsis. The process has been, in tendency at least, to connect certain juridical results with given physical facts, without too much inquiry into the detailed and complicated system of concepts that intervene to make the juridical results rationally possible. This can best be illustrated by a homely example. A man puts a kettle of water on a stove and lights a fire under the kettle expecting to produce boiling water. He lights the fire and makes the water boil, is the elliptical way of explaining what happens. This simple explanation takes no account of the very complicated physical phenomena that intervene after the fire is lighted and before the water boils.

It may be suggested that for boiling water, no further explanation is necessary. That is probably true; but legal operations are not always so simple that we can jump the gap between a jural fact and a juridical result without danger of getting the wrong result. Certainly there are many technical operations that need a close investigation of the successive jural steps that lead from a physical fact to an ultimate legal conclusion. Another answer is that even though it may be safe, practically, to abbreviate the jural process, legal science can not decline to inquire into the exact and complete detail of the matter. No one can say in advance as to the varied matters of science when and where they will find application. From the standpoint of science itself, the suggestion of a presently demonstrable practical application is destructive of the spirit of scientific inquiry. To the impatient demand of the Philistine to make the law an easy and short road, the jurist may respond as Menaechmus answered his pupil, Alexander the Great: "In the country there are private and even royal roads, but in geometry there is only one

road for all." And here, too, since Menaechmus was the inventor of conic sections, it may be recalled that conic sections were theoretically studied for nearly two thousand years before they were associated with one of the greatest discoveries of modern times, the formulation by Kepler of the laws of planetary motion.

Scientific truth may be, and often is, in advance of demonstrable practical application, but in the law the clear tendency has been to discover a legal science after the applied law had reached a high state of practical development. The Roman lawyer never reached a genuine legal science, and what is now applied as Roman law is a scientific reconstruction made more than a thousand years after Justinian. Long after English law had attained maturity in the fields of property, obligation, family law, inheritance law, and procedure, the influence of the continental elaboration of the raw materials of Roman law reached England principally through Austin. But the fruits of Austin's labor were mainly theoretical rather than practical, and several decades elapsed before the analytical researches of Austin were seriously continued. In the meantime, another movement which originated in Italy and was brought to its highest development in Germany—the historical movement—spread beyond the seas, and it soon became fashionable to speak of Austin in terms of derision. There are fashions of intellectual defamation just as there are fashions in clothing and speech, and no great man in modern times has suffered more from the repetition of absurdities and misunderstandings than Austin. Incidentally, the habit of criticizing Austin's theory of sovereignty and his imperative theory of law served to retard analytical inquiries into legal ideas.

As applied to the subject of this book, no proof is more convincing of the sluggishness of pure legal science than the fact of the long neglect of jural relations. Let it be emphasized again that jural relationship is a fundamental idea. No legal phenomenon can exist without dealing with one or more jural relations. The purpose of every legal rule is to create the formal conditions for the existence of jural relations. No technical analysis of a legal question can be made without the manipulation, whether consciously or not, of jural relations. No legal solution



is scientifically understandable without the interplay of jural facts and jural relations.

Yet in spite of this central importance of the idea of jural relation, the Roman lawyers did not have a special term for it. The first theoretical discussion of jural relation was that of Savigny (in 1839) but even that great scholar disposed of it in a few introductory paragraphs. After Savigny the idea itself brought to the foreground of attention could never again be completely lost, and we find that the pandect treatises regularly mention the 'Rechtsverhältnis', but they hardly do more. In Bekker's "System" (1886), for example, the author devotes fifteen lines of text to the idea. That great repository of juristic and dogmatic information, Windscheid's "Lehrbuch" devotes seven lines of text to this important idea. Three books in German deserving of special mention dealing with jural relations have appeared: Neuner's "Wesen und Arten der Privatrechtsverhältnisse" (1866); Punschart's "Fundamentalen Rechtsverhältnisse" (1885); and Bierling's "Prinzipienlehre" (1894-1917). And here it would be inexcusable to pass by without mentioning the strikingly original works of Terry ("Leading Principles of Anglo-American Law" [1884]) and of Roguin ("La règle de droit" [1889]). The celebrated essay of Hohfeld entitled "Fundamental Legal Conceptions" (1913), of course, could not be omitted.

From the author's point of view the additions to our knowledge of jural relation attempted in this book consist in the following things:

1. The precise juristic nature of a jural relation is stated. It is reduced to ultimate terms which may be visually and mechanically objectified. A jural relation involves, either directly or indirectly, control of the natural physical freedom of movement of a human being.

2. A complete table is given of basic jural relations consisting of a primary and secondary type of relation, connected by a process called 'reciprocation.' This table of jural relations is the key to the whole system of jural ideas.



3. Another feature is the table of jural opposition, which arranges the four basic relations into a system of contraries and sub-contraries, reciprocals, and negatives.

4. An explanation is made of the process of juristic conversion by which, so far as professional speech requires it, the negative of a given jural relation term may be expressed by another specific term.

5. Closely connected with the foregoing features is the table of common denominators by which the various rights and liabilities are systematically arranged in pairs of generic terms.

6. Next in importance for legal analysis to the systematic table of jural relations, is the 'mesonomic' relation. A part, but only a very small part, of what is embraced by the idea of mesonomic relations has long been known under the name 'imperfect rights,' but it has been generally supposed that the category of imperfect rights is an exceptional and relatively unimportant one. The 'mesonomic' relation appears to be an idea of major importance, and in technical importance it completely overshadows other legal relations. Recognition of the mesonomic relation makes possible a complete historical statement of any jural phenomenon. It supplies the jural element that is one of the principal causes of ellipsis in professional language. In consequence of the fact that the missing links in legal reasoning are supplied, it often makes possible a rational explanation of legal ideas that are beset by obscurities and vagueness. With a complete scientific equipment of ideas it is often possible, not simply to clarify and rationalize legal doctrine, but, on occasion, legal doctrine itself is provided with the rational grounds for readjustment of legal rules.

7. Considerable space and discussion have been devoted to the idea of jural conflict. This idea seems to be especially important in resolving a variety of different problems.

8. A classification of jural inter-relations is set out and explained.

9. The fundamental jural concept, 'act,' has been analyzed in a new way and with a new result, but in reaching this result a compromise is reached with other views. The 'modus vivendi' consists in giving a name to the three leading conceptions of act. There is a 'physical' act in the sense of what causes effects; there is a 'legal' act in the sense of a legal result which the law will notice; and, lastly, there is a 'jural' act with a slightly different meaning from 'legal' act, which is the immediate cause of the creation, modification, or extinction of jural relations. These three meanings, each one legitimate for its own purpose, give place to the causation element, the result element, and the jural causation factor.

10. A theory of personateness is advanced which unifies the concept for all its manifestations. The prevailing legal theory of personateness which attempts to distinguish legal persons as 'natural' and 'artificial' legal persons is demonstrably producing evil results.

11. Among other matters to which advance attention may be directed is the conceptual nature of jural relations, one of the important by-products of which is to require that Rights of Foreign Incidence (so-called Conflict of Laws) be based on the idea of territorial recognition instead of territorial situs of jural relations; the atomic character of jural relations, a discovery first made by Hohfeld and later more clearly formulated by Corbin; the function of ectophylactic (protecting) rights; the nature and scope of contingency; isolation of a category of 'ineffective' relations and 'ineffective' acts; the juristic nature of 'unpolarized' (in rem) rights; analysis of the concept 'jural thing' and its reduction to thing elements; and the reduction of the juridical function in the strictest sense to the imposition of a sanction for the violation of a legal duty.

The foregoing brief enumeration of the objects attained or sought, will serve to show how this book is to be classified. It is an essay in Formal Jurisprudence (or what has been called Analytical Jurisprudence). It is not primarily a book on the Theory of Law or the Philosophy of Law, since we are not

concerned here with the nature of law or the sources of law. It represents the view that the science of law is conceptual in all of its elements and operations and that the basis of this conceptual structure is one of purely objective facts.

One of the difficulties that will be encountered in the chapters that follow is the terminology. While inertia is to be expected for invention of terms or in new applications, it should not necessarily be insuperable. And may it not also be expected that in time the law will live up to its claims of being a learned profession? It is true the lawyer's profession has grown up in an apprentice tradition, but we can not assume for the ideas of legal science that the system was closed at the time of Baron Parke; or that it is something like the register of writs to be amplified accordian-like on the principle of 'consimilis casus' or that the word 'quasi' should serve to connect all new ideas with what already is familiar. The lawyer's aversion to new terms for new ideas must be truly astonishing to a physician, a botanist, a chemist, or even an amateur in radio operation, if he understands how deep that aversion is. To avoid, as far as convenient, constant repetition of the meaning of novel terms, there has been supplied a glossary of juristic terms. The reader is recommended to make use of this glossary each time that a new term is not fully understood. If that trouble is taken, nothing of invincible difficulty will be encountered.

In some respects, too much concession, perhaps, has been made to the conventions of professional speech. For example, in the frequent use of contract problems, we have used the familiar expression "acceptance of an offer." A moment's reflection will show that this expression is entirely inaccurate. The legal phenomenon described deals neither with an 'acceptance' nor with an 'offer.' What an offeree does is to *exercise a power* vested in him to create a contractual relation. The offer no longer exists and it can not be 'accepted'; nor, for the same reason, can an offer be revoked.

The chapters that follow are to a considerable extent revisions of articles published in various American and foreign law

journals. Some of the revisions are slight; others are extensive. Several chapters are entirely new. The articles already published are so widely scattered that few even of those especially interested in the science of law have found it convenient to attempt to search them out.

One other matter must be mentioned—the controversial side of the question of jural relations. That side can not be ignored. The author's views on jural relations clash with those of the late Professor Hohfeld. The difference superficially looks like a mere matter of terms, but in essence the gap is a wide one. Professor Hohfeld's point of view has been made available in a volume of essays entitled "Fundamental Legal Conceptions as Applied in Judicial Reasoning," and since his table of terms has been widely accepted by judges, text-writers, and law teachers, it has been thought advisable to avoid as far as possible in the present writer's presentation of his own views, any controversial discussion, and to deal with the controversy separately in an appendix. In this connection, it is right to say that while the author has been a friendly opponent of Professor Hohfeld in juristic matters, it is probable that this book would not have appeared except for Professor Hohfeld's celebrated pioneer undertaking.

For permission to make use of articles already published, the author tenders thanks to the publishers of the following journals: *American Bar Association Journal*, *American Law School Review*, *Boston University Law Review*, *California Law Review*, *Columbia Law Review*, *Cornell Law Quarterly*, *Hogaku Kyakwai Zasshi* (Tokyo), *Illinois Law Quarterly*, *Illinois Law Review*, *Kentucky Law Journal*, *Michigan Law Review*, *Pennsylvania Law Review*, *Rivista Internazionale di Filosofia del Diritto* (Rome), *Yale Law Journal*.



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## INTRODUCTION

By JOHN H. WIGMORE <sup>1</sup>

A long time ago (it was soon after I became a professor of law) I began to work out a complete classification and analysis of the Anglo-American legal ideas, on a modern and independent plan. It was to be modern, because Austin was then nearly a century in the past; and it was to be independent, because the borrowed "jus in rem" and "jus ad rem" catchwords, and their congeners, did not fit our law.

But there was then no professional interest in progress in that field. Other needs pressed for my attention. The manuscript of this elaborate analysis—enough to fill a suit-case—lies now in a discarded bundle. It was premature; and in the light of later thought, it now is seen to be crude and useless.

In the meantime, however, the times becoming riper, others were working in that field. Among them came first, Gray, thinking on orthodox but progressive lines. Then came Hohfeld, with genuine originality and a forecast of the true method. And now comes Kocourek, with a complete grasp of the entire problem and a real science of legal ideas.

The construction of a science calls for two things; first, a realistic analysis of all the specific data in a given body of knowledge; and, secondly, a synthesis of those ideas in a consistent terminology that makes possible the handling of the ideas and thus the progress of the science. Thirdly, it may be necessary and feasible (as in mathematics) to add a symbolism as a part of the terminology. I think that it was Jevons, in his "Principles of Science," who first pointed out these features.

The second feature—the terminology—is what Law has mostly lacked and needed for further progress as a science. And yet it is the hardest to attain, in a field where the applied science

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<sup>1</sup> Professor of law in Northwestern University.

is every day used by thousands of practitioners who care nothing for science. It has been my fate to experience a dose of this professional philistinism. In a book of mine, now widely used, some endeavor was made to use an accurate terminology; a few existing words (such as "prophylactic") were given legal applications; and one single new term ("autoptic proference") was introduced. And yet, in a book of three thousand pages, these trifling innovations, sparingly used, seemed to strike the minds of some reviewers and readers more forcibly than anything else in the book. And to this day, after twenty years or more, a standard genial jest, at friendly meetings, consisting in a reference to that single phrase, "autoptic proference," serves to bring an hilarious reaction, as a symbol of its academic unfitness in a law book!

And yet, how anomalous stands the Law in this respect! Observe the sister applied sciences of Medicine and Engineering. In Engineering, the traditions of mathematics, ages old, have long ago accustomed the practitioners to a truly scientific terminology. In Medicine, the transformation is probably not more than a century old; but it is now an accepted achievement. When laymen refer to a fellow-citizen's ailment and death, it suffices to say that he died of "heart trouble." But the doctors, referring to this event, must have their own technical lingo, and if one of them should say "myocarditis," the others would know immediately that he did not mean "endocarditis" or "pericarditis," and that he referred to an inflammation of a "muscular membrane, peculiarly striated, consisting of two sets of fibers, auricular and ventricular, separated by fibrous rings which surround the auriculo-ventricular orifices." The point is that medical terminology is constructed with complete etymological consistency.

And in Engineering, of course, the final step has been taken and a symbolism supplements the terminology; the terms themselves have not been etymologically re-cast, as in medicine (e. g., the engineers use "beam," "truss," "strut," etc.); but the calculations necessary in practical operation are made in the symbolized terminology of mathematics. When a bridge engineer wishes, e. g., to explain to a colleague what combination of elements

he is using in a particular bridge to meet the conditions of load, materials, wind-pressure, height, length, etc., he comes to the question how he determined that the length of one of the heavy steel wires supporting an angle of a certain truss carrying 10 tons should be 20' 6". Now ("stretch" being "the uniform increase or decrease in the linear dimensions of a body in a certain direction," and "stretch modulus" being the "constant ratio of longitudinal stress to longitudinal strain for a given substance") the engineer explains that he worked out the allowance for the proper stretch modulus by the following calculation:

"A wire of sectional area  $q$ , held tense by a force  $F$ , is under homogeneous longitudinal stress  $P$  such that

$$P = \frac{F}{q}$$

"Let  $l$  be the initial length of the wire, and  $l + \Delta l$  its length under tension, then

$$l : l + \Delta l = 1 : 1 + \beta;$$

"whence  $\beta = \frac{\Delta l}{l}$  Substituting this value of  $\beta$ , and the above

value of  $P$  in  $E = \frac{P}{\beta}$  we have

$$(\text{stretch modulus}) E = \frac{Fl}{q \Delta l}$$

"This equation enables the calculation of  $E$  (stretch modulus) when  $F$ ,  $l$ ,  $q$ , and  $\Delta l$  have been observed."

It has long been my belief that the applied science of Law is capable of equal achievements with those of Medicine and of Engineering. Its concepts are as definite, and their logical operation is as sure. What has been lacking is, first, a complete realistic analysis of those concepts, and, secondly, an apt and consistent terminology that will permit accurate discussion of the concepts.

In this book, it is believed, we have the first presentation of such a system.

May the profession show the courage to master it!



# JURAL RELATIONS

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## CHAPTER I

### NATURE AND KINDS OF JURAL RELATION

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| 1. Elements of legal phenomena.                         | 8. The power relation is a dynamic jural relation.                           |
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1. **Elements of legal phenomena.**—Legal phenomena involve three elements.

(1) *A system of potential legal rules.* First, there is a body of legal rules existing only in the abstract—potentially—awaiting application in concrete cases.

Thus, it may be a rule of law that “a borrower is responsible for any alteration or deterioration of the thing lent, which is brought about by use of the thing contrary to agreement.” Until a concrete case is presented where there is a loan for use of a thing, the rule is abstract in the sense that it finds no application. Even though the rule exists and even though an actual loan for use is made, the rule may still be regarded in another sense as unapplied or abstract, until in some way the rule is violated. If the borrower uses the thing lent in a way not contemplated by the contract, and harm follows to the thing in its economic value, the lender has a claim against the borrower for damages.

But, even yet, the rule may be regarded as abstract or unapplied until the lender enforces his claim for damages by resort to a court of law. In the strictest sense, the rule remains abstract until the last stage of judgment and execution is reached. Until then, also, no matter how the rule may have had a previous existence or potency—whether it had been formulated in a legislative statement, or whether it had existed as a deduction from other cases, or, especially, where it wholly lacked literal and logical existence—its actual application could not be predicted in advance, in all the variations of circumstance which might affect the rule. Legal rules, therefore, except as actually applied, are, in the strictest sense, not only abstract, but even hypothetical, since apodictic certainty can not be predicted of any application, and, especially, not of any particular application.

(2) *Situations of fact.* The second element of legal phenomena is the situations of fact upon which legal rules operate and to which they are applied.

The law does not apply to all situations of fact even where opposing human wills are concerned. If *A* promises *B* to give to him a horse as a present, and fails to do what he promises, or if *A* accepts *B*'s invitation to luncheon and fails to attend—these are situations of fact to which no direct legal consequences attach. The promisee of the gift might sue for the horse or its value, but the judgment of the court would be against him, because a bare promise of a gift is not binding. There is a view that even in such a case a legal relation is found.

The law or legal rules can not operate in a regular and permanent way upon the situations of fact of the external world without organization. Organization is necessary on both sides. On the side of the law itself, considered as a force, there must be an organization by which legal rules may regularly be declared, applied, and carried into effect. The side to which the force of the law with its organization of courts and procedure is to be applied, must, likewise, be organized. Organization of the factual world is achieved not directly by law, but by the inherent forces of society. Law, itself, in a modern sense, is the out-growth of the collisions of social forces, and it was not until the modern age that law became clearly differentiated from other social forms such as morals, religion, deportment, fashion.

(3) *Jural relations.* The third element of legal phenomena is the connecting link between law regarded (often, if not always,



by prolepsis) as a body of legal rules and the social activities upon which the law is to operate.

It is not enough that there be law in the abstract, set over against a material content of social activities. It is just as necessary here that there be a connecting principle, as that the steam compressed in a steel tank be connected with a system of valves and levers in order that the force of the steam may be regularly and usefully employed in work. The connecting principle between the force of the law and the material social content upon which it is to operate is the jural relationship, 'juri nexus,' or 'juri vinculum.' Since the law does not govern every possible situation of fact, it follows that jural relation, likewise, does not attach to every situation of fact. Jural relations come into existence, are subject to modification during their existence, and, lastly, they submit to destruction. There are always large fields of social activity where jural relations do not exist. These are the fields of liberty where legal regulation does not extend except in a negative sense.

*Law governs only future conduct.* Before proceeding to consider the nature of jural relation, it is necessary to explain, briefly, the essential method of the law's operation. The law functions only through human conduct, and, accordingly, it looks solely to *future* acts. Persons are invested by the law with the capability to claim from other persons certain positive acts or certain forbearances. If these acts or forbearances are not forthcoming, the person entitled is invested with a new capability to proceed against the wrongdoer by measures of self-help or by resort to legal process in the courts. Conversely, a person may act against another who is not a wrongdoer and may thus create a claim in the person proceeded against, or in another, without any antecedent claim existing in himself. The capability to claim an act from another is called a 'right' (in the strict sense). The capability to act against another is called a "power." If the word *right* is given a strict meaning, it is never correct to say that one has right to *do* this or that. One may have the *liberty* to act or the *power* to act, but never the *right* to act. Since the term 'right' in popular, and even curial, usage regularly has various meanings, it will be found convenient to substitute for 'right' the term 'claim.' In this capability to claim acts from others or the power to act

against others, two fundamental elements may be discerned—persons and acts.

*Persons and acts.* These two elements are related to each other as constants and variables in mathematics. The factual basis of social phenomena is legally organized through the device of personateness—centers of legal force or of attraction of legal force—having a capacity for claims, duties, powers, liabilities, or for some of these. Personateness being recognized, it remains a constant center of legal force or attraction. But personateness is constant only in a relative sense, i. e., in relation to acts. Natural personateness ends usually with the physical death of the human being personified; artificial personateness ends when the economic objects of the person have ceased. As to the legal quality of personateness as such, there is no juristic distinction, whether the base of personateness is a human being or an aggregate of things. In other words, the personateness of a human being is as much a pure concept as the personateness attributed to a mass of physical objects, since a human being (e. g., a slave) without the attribution of personateness is not a legal center of force or of attraction, whatever his physical qualities or powers in the factual world. Personateness may also be regarded as a constant even though it is susceptible of diminution or of augmentation. Thus, a normal person (e. g., a citizen of full age, with full capacity for claims, duties, powers, and liabilities) may be reduced to abnormal legal condition by becoming a foreign citizen; and conversely, an infant with the flow of time will become a normal legal person, i. e., with full capacity for jural relations. In all such cases, personateness itself, considered as a minimum capacity for jural relations, remains constant whatever the vicissitudes of legal condition which reduce or augment legal capacity; provided only the minimum is not passed in a reduction of legal capacity, in which case personateness would cease.

Acts, on the contrary, are highly variable. Through acts personateness may be enlarged or diminished, that is to say, capacities for jural relation may be increased (e. g., by naturalization) or reduced (e. g., marriage of feme sole). But the most important function of acts is in the increase or decrease of the economic orbit of personateness. Thus a poor man may become wealthy. While his legal personateness remains the same, the economic ambit of his jural relations, his legal *personality*, has increased. But here, also, there is a minimum which can not be passed without destroying personateness itself. The child just born of pauper parentage would have legal claims which attach to the protection of his body—life, limbs, freedom of locomotion.

tion, etc. He would have no other legal relations except those whose object is the protection of his integrity as a free human being. So much, at least, is a minimum, a reduction of which would imply the condition of slavery. The same reasoning is applicable to the economic base or corpus of artificial personateness. A corporation with only liabilities has ceased to exist for any purpose of its own; but, in this case, personateness may survive economic death (e. g., to fix the liability of stockholders; for substitution of new capital, etc.).

For the present need a jural relation may be roughly described as a situation of fact by virtue of which one person, presently or contingently, may affect the natural physical freedom of another person with legal consequences.

We have seen that of the two fundamental elements in jural relations, acts are the one that qualify personality. Acts, together with events, are the sole cause of legal phenomena. They are the dynamic force through which jural relations are brought into existence, are modified, and are extinguished. Since, however, the law governs only conduct, i. e., future acts, and has no influence on events (the non-willed happenings of nature) our examination is restricted to acts (occurrences subject to control by the human will).

2. **Functions of acts.**—From the standpoint of acts, as usually analyzed, there are three aspects to be considered.

(1) *One may act for himself.* For example, he may use his own goods. This is *freedom*. So long as the freedom is not exceeded, such act or acts are non-jural. The law takes no notice of them. If freedom is exceeded, it becomes a wrong. Thus, one may bore for water on his own land for his own use, but one may not, even on his own land, intercept a subterranean flow of water, if the purpose is solely to do harm to a neighbor. Here freedom has passed its bounds, and has become a wrong. Freedom, being non-jural, is not protected as such. Its protection comes only through the armor of other legal ideas, and chiefly through claims (rights). One has the freedom to walk on his own land, but he has no claim (right) to walk on his land. His claim is that others shall not trespass on the land

and shall not molest his physical person. These claims are the armor of his freedom, but the two ideas are juristically entirely distinct.

(2) *One can with legal effect claim acts from another.* He may require another to act for him. Such a claim is called a right and its correlate is a duty. Whenever a claim exists, a duty also is found. Such duties may be those of persons identified by the investitive fact of the jural relation (so-called rights in personam or polarized rights) or those of persons not identified by the investitive fact of the jural relation (so-called rights in rem or unpolarized rights). Thus, if *A* lends money to *B*, the fact that the loan is made identifies *B* at once as the person owing the duty of repayment. Again, if *A* hires *B* to do certain work, then every other person owes *A* and *B*, respectively, a duty not to interfere with the relation; but the persons thus owing duties are not identified by the contract by which *A* employs *B*. In the first instance (loan of money) the duty is positive—to pay money. In the second instance (contract for service) the duty owing by third persons is negative—not to interfere with the contract.

(3) *One can with legal effect act against another.* This is a power. In the widest sense, the capability to claim, with legal effect, acts from others is also a power. The more restricted meaning includes only what one can *do* with legal effect against others. In this sense, a debtor has the power of destroying the legal relation in which he is bound, by paying his debt. Again, he has the power to infringe the right of his creditor by non-payment, thereby committing a wrong.

In a restricted sense, the narrow technical meaning, a power is a capability in one person, conferred by a formal act by a second person, to proceed adversely against the grantor of the power, or to create, modify, or extinguish a claim (right) or power (technical sense) in a third person. In land law 'power' has a special application, being the method for raising a future 'use.'

This analysis, while sufficient to distinguish the essential differences among the concepts of freedom, claim, and power, is not exhaustive, and, accordingly, another approach is necessary.



3. **Jural synthesis of the functions of acts.**—Excluding freedom as a non-jural concept, acts with reference to other persons have two directions: (1) *A* may act toward *B*; (2) *B* may act toward *A*. In these two directions of acts there are two phases—one an active phase; the other a passive phase (from the standpoint of the dominus (holder) of the relation). The acts themselves are either positive or negative. Since three sets of ideas are involved, a diagram will be found useful.

TABLE NO. I

## JURAL RELATIONS

		D	RIGHTS	ACTS	LIGATIONS	S
I	1	PASSIVE	CLAIM (Attractive)	D ← POSITIVE	S	ACTIVE
	2			D ← NEGATIVE	S	
II	3		IMMUNITY (Repulsive)	D] ← POSITIVE	S	
	4			D] ← NEGATIVE	S	
III	5	ACTIVE	PRIVILEGE (Recessive)	D] → POSITIVE	S	PASSIVE
	6			D] → NEGATIVE	S	
IV	7		POWER (Processive)	D → POSITIVE	S	
	8			D → NEGATIVE	S	

[The arrows indicate the direction of the acts. For example, in No. 1, *S* owes a positive duty to *D* (e. g., to pay money). *D* is the dominus of the relation. The terms 'active' or 'passive' characterize the jural relation from the standpoint of the dominus (holder) or servus (bearer) of the relation, respectively.

The brackets before or behind arrows indicate that the person opposite the bracket (*D*) has the capability to stop the act. For example, in No. 3, *D* has the legal capability to prevent *S* from an act (e. g., making a levy on *D*'s exempt chattels). Again, in No. 6, *D* has the capability to avoid a negative act (e. g., as in privileged libel).]

#### 4. Variety of meaning attached to basic juristic terms.—

A *claim* is a legal capability to require a positive or negative act of another person; an *immunity* is a legal capability to prevent a positive or negative act of another; a *privilege* is a legal capability to decline an act toward another; and a *power* is a capa-



bility to act with legal effect toward another. All of these terms are in common use, but the greatest variety of meaning is attached to them.<sup>1</sup>

While uniformity is not to be quickly expected in these matters, it is highly desirable at least that such terms be used with a precise signification.<sup>2</sup> The difficulty lies not in that jurists use juristic terms in different senses among themselves—for such

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<sup>1</sup> In the older books, juristic terms are not freely used. The term 'right' often appears and next in frequency 'privilege.' The terms 'immunity' and 'disability,' like other Latin words, were in use from the very beginning of Anglo-Norman law. 'Duty' and 'power' as technical terms are of late appearance.

In Blackstone's day the whole gamut of juristic terms was in common use among lawyers, but no serious attempt was made to give them precise meanings. Then, as now they were used in a descriptive sense where the same term could do service for a variety of notions interchangeably with other terms. The following excerpt from Blackstone will illustrate this statement:

COM. i 129: "Thus much for the declaration of our *rights* and *liberties*. The *rights* themselves \* \* \* consist in a number of private *immunities* which will appear \* \* \* to be, indeed, no other than either that residuum of natural *liberty* which is not required by the laws of society to be sacrificed to public convenience or else those civil *privileges* which society has engaged to provide in lieu of the natural *liberties* so given up by individuals."

<sup>2</sup> The term 'right' enjoys a clear advantage of favor over other juristic terms, but if its secondary meanings were ignored, 'privilege' would have to be regarded a serious competitor, since it has at least six well defined variations: (1) It may mean '*claim*' (e. g., pensions, the privilege of Parliament to be attended by the judges of King's Bench); (2) it may mean '*immunity*' (e. g., privilege from arrest); (3) it is '*privilege*' in the correct and proper sense (e. g., privilege of using a public license or franchise, the privilege of voting, against self-crimination, etc.); (4) it may mean '*power*' (e. g., privilege of recaption of chattels); (5) it may mean '*liberty*' (e. g., privilege of using or abusing one's land); (6) it may mean '*capacity*' (e. g., the privilege of a corporation to enter into contracts). The term 'privilege' no doubt also has certain secondary meanings not of sufficient importance, however, in actual speech to require discussion.

The term 'immunity' is much more restricted in its applications; it would not be used in the sense of 'claim' or of 'power,' but it is freely convertible into privilege (strict sense). A recent writer, however, has made an application of 'immunity' which draws attention to the fact that negations of affirmative legal concepts need a special terminology of their own. Thus Prof. Francis H. Bohlen speaks of the *absence of duty* as 'immunity': "Duty of Landowner to Persons Entering Premises": Penn. L. Rev. 69: 142 (145); Bohlen "Studies in Torts," 156.

It is clear from what has already been shown that the term "right" may be used and is used to designate the dominant side, the advantage side, of all types of jural relation. It seems best to compromise with this practise, whether we like it or not. The solution is a simple one—to use the term 'claim' when 'right' in the strict sense is intended, and to use

variations could readily enough be mastered—but that often such terms have no definite, no fixed, position even as to the individual case. It is not, therefore, insisted that the particular selection and arrangement of words to indicate the various classes of acts enumerated have any necessary finality; but it is believed that both the matter of selection and arrangement are in accord, in general, with the prevailing usage.<sup>3</sup> At any rate, apart from mere words, as to which there is, and likely long will be, more

'right' as heretofore in the broad sense of legal advantage. There is need often felt when dealing with jural relations for a term of similar generality for legal disadvantage, since the terms 'advantage' and 'disadvantage' are somewhat cumbersome. The word 'ligation' is suggested for the servient side of all legal relations. In general terms, therefore, legal advantages and disadvantages may be spoken of as 'rights' and 'ligations.'

<sup>3</sup> The term 'right' above all others is made to do service for a variety of ideas not only in popular, but also in professional, speech. It may mean 'claim' (e. g., the 'right' to have an act done, which is the strict sense); 'immunity' (e. g., the 'right' to prevent an illegal restraint); 'privilege' (e. g., the 'right' to refuse to testify against oneself or the 'right' to vote); 'power' (e. g., the 'right' to violate a contract); 'liberty' (e. g., the 'right' to do as one pleases with his own). Not only is the term 'right' applied (often without discrimination) to every variety of act and capability to control acts, but it has various other secondary meanings, as follows: (1) The states of fact upon which jural relations rest (e. g., 'right' of life, etc.); (2) the interest upon which jural relations are based; (3) the means by which jural relations are protected; (4) the idea of what is 'just' (cf. Pound "Legal Rights," Int. J. Ethics, XXVI 92 sq.); (5) the totality of a jural relation, i. e., the relation itself; (6) in the specific sense of capacity (e. g., of a corporation to perform a 'juristic' act, *intra vires*).

The term 'power' is not often used in professional speech except when the strict technical meaning is intended (e. g., power of sale); but the terms 'immunity' and 'privilege' are often used interchangeably. Thus, in *Skewys v. Chamond* (1546) 1 Dyer 59b, the court speaks of "privilege from arrest"; *immunity*, however, is the proper word. See, also *Fawkner and Annis* (1672) 3 Keble 352; *Simpson v. Hartopp* (1744) Willes 512. In *Waller v. Hanger* (1617) 3 Bulst. 1, a notable case in its day, the question was whether a dead man by his representative had a privilege from payment of prisage. In one of the numerous opinions in the case it is said (p. 3): The widow representative "shall not have this *privilege* [of not paying prisage?] for she hath not any wines; she is *civis*, but she has not *vina civium*; if she had these wines in *jure proprio*, then she should have the benefit of this *immunity* [from an action?]." Confusion of these two terms is easily explainable on the ground that privilege and immunity are both regressive legal relations; they have the common quality of 'exemption.'

It may also be pointed out here that 'duty' has more than one meaning. In the strict and proper sense 'duty' corresponds to a 'right' (strict sense = claim). There can be no 'right' without a 'duty'; nor can there be a 'duty' without a 'right.' The first half of this proposition is universally admitted, but the second half has been denied. Thus, it is said that duties to obey the commands of criminal law or duties to the general public (e. g., not to commit a public nuisance) are 'absolute' duties which do not

or less debate, the arrangement of the content, by whatever labels designated, can not be dispensed with in a clear understanding of the nature of jural relations.

5. There are only two ultimate jural relations.—(1) *Reciprocation*.. According to the above table, there appear to be four fundamental types of jural relation, but a closer examination of the matter shows that there are in fact only two fundamental types—claims and powers. Immunity is only the reciprocal of claim, and privilege is only the reciprocal of power. Thus if *D* is entitled to have money paid by *S* to satisfy a debt, *D* is said to have a claim to the act of payment. *D* has a claim to a positive act of *S*. The reciprocal of this claim is *D*'s capability to prevent with legal effect the negative act of non-performance of *S*'s duty to pay the debt. In a primary sense, *D* has a *claim* to have a duty performed. In a secondary or reciprocating sense he has an *immunity* from the non-performance of *S*'s duty.<sup>4</sup>

Again, *D*, without incurring liability, under certain circumstances, may go upon the land of *S* (e. g., 'right' of deviation). Such an act is the exercise of a positive power. The reciprocal of this power to use the land of another is a negative privilege to avoid the performance of a negative duty, i. e., the duty not to commit a trespass.

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correspond to right (claims) in contrast with 'relative' duties which do correspond to rights (claims). See *Austin* "Jur." (4th ed.) I, pp. 67 sq. The terminology, 'absolute' duties and 'relative' duties is unfortunate and the supposed distinction upon which it rests is now repudiated. See *Holland* "Jur." (11th ed.) p. 131; *Salmond* "Jur." (3rd ed.) § 72, p. 187.

Some of the variant uses of the term 'duty' are illustrated in the following phrases commonly in use in the language of judges and commentators: *Duty* of the buyer of goods to inspect (etc.); *Duty* of a depositor to examine his pass-book (etc.); *Duty* of a person harmed by negligence of another not to be contributorily negligent (cf. *Terry* "Lead. Prin.," § 140); *Duty* of a holder of a note to give notice of non-payment (etc.); *Duty* of a person dealing with a special agent to ascertain the agent's authority; *Duty* of a person harmed by the wrong of another to mitigate the loss. These are not 'duties' in the strict juristic sense, but rather conditions precedent to the existence of claims or powers.

<sup>4</sup> Reciprocation of claim and immunity and of power and privilege may also exist where the primary stress is on the secondary term (i. e., on immunity or on privilege). For example, a defendant who has testified against himself under compulsion before a grand jury may plead immunity to an indictment. Here, the capability to interpose the stop of immunity against the (positive) act of prosecution, regarded as that of the state or of the prosecuting officer, is the reciprocal of a (negative) duty not to prosecute. The 'immunity' relation is a jural relation because it involves a capability to restrict effectually the freedom of action of another; i. e., of the state or the prosecuting officer.

Immunities do not create claims nor do privileges create powers; but, contrariwise, immunities grow out of, are reciprocal to, claims, and privileges grow out of, are reciprocal to, powers. According to this view, 1 and 4, 2 and 3, 5 and 8, and 6 and 7 (see Table, *supra*) are reciprocals. Since claims and powers are the causal terms respectively of immunities and privileges, they alone are entitled to be considered as fundamental ideas, the other two being only derivative.<sup>5</sup>

(2) *Active and passive relations.* Even apart from the causal relation between these two sets of terms, the conclusion is justified from another point of view. Relations are passive or active. Passive relations are where the acts of one person are under the control of another person. When *D* controls with legal effect the conduct of *S* whether in the primary sense of his capability to *require* a positive or negative act of *S*, or in the secondary sense of his capability to *obstruct* with legal effect a positive or negative act of *S*, there is present in both cases the common element of what *D claims* with legal effect. An active relation is where one person controls with legal effect his own acts toward another person. When *D* can with legal effect proceed against *S*, whether in the primary sense of his capability to *move*, or in the secondary sense of his capability to *refuse* to *move* toward *S*, there, likewise, is present the common element of *power*, or what one can do with legal effect.

(3) *Correlatives.* In addition to the active and passive aspect of these relations, and the reciprocating phases of the underlying acts, it will be noticed that each major group is identified at its termini by correlatives: claim and duty; immunity and disability; privilege and inability; power and liability. But this description does not exhaust the matter. Each major group (I-IV) may be further described by a term distinctive of each relation. Both the language of logic and of law fail to provide suitable terminology and it will be convenient to employ for this purpose terms derived from mechanics, as follows:

(4) *Mechanical functions of jural relations—Attraction—*

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<sup>5</sup> When 'immunity' and 'privilege' are used instead of 'claim' and 'power,' respectively,—in other words, when they are emphasized—they always indicate an abnormal jural situation differing from the general rule. Thus, if one is 'immune' from a prosecution or if one has a 'privilege' of uttering a libel, his situation is exceptional, since 'immunity' from a prosecution or 'privilege' to utter a libel is necessarily a departure from the general rule of liability and is so recognized by the law. Without this distinction there would be in each case a simple duplication of terms to indicate precisely the same jural idea.



*Repulsion—Recession—Procession.* Group I is constituted of *attractive* relations. The capability of *D* attracts the act of *S*. Group II is constituted of *repulsive* relations. The capability of *D* is to ward off the act of *S*. Group III is constituted of *recessive* relations. Here *D* has the capability to decline action toward *S*. Group IV is constituted of *processive* relations since *D* can act against *S*. These terms are used to qualify the legal relation from the standpoint of the dominus of the relation. They may also be used to qualify the ligation of the servus of the relation. Thus a processive ligation is always a duty. The mechanical applicability of these terms can be best illustrated by following to a conclusion the operation of a ligable act. Thus a repulsive right involves a recessive ligation which in turn involves a processive ligation, which is correlated by an attractive right. Repulsion and attraction go together and recession and procession also go together. In this process the sign of the act changes from positive to negative or from negative to positive.

(5) *Negative-Positive aspect of acts.* It may, furthermore, be observed that Groups I and III, and IV and II, are, respectively, in each case, negative-positive aspects of the same act. (The terms negative-positive connote here, as in logic, the absence or presence of a quality.) In Group I the act is attracted; it must be performed. In Group III the relation is recessive, and the act need not be performed—there is no must. In Group II the act of another can be repelled. In Group IV the act of another can not be repelled.

(6) *Progressive and regressive relations.* Lastly, another connection among these relations may be noticed: Groups I and IV involve dynamic situations where acts must be (I) or can be (IV) performed; Groups II and III involve static situations where acts can be repelled (II) or declined (III). The significance of this distinction is that in the first group (I and IV) which will be now called Progressive jural relations, further consequences directly follow; while in the second group (II and III) which will now be called Regressive jural relations, further consequences follow only indirectly through claims and powers. Obviously, this distinction arises from the reciprocal nature of immunities (to claims) and of privileges (to powers).

6. *Unilateral quality of legal phenomena.*—It has already been observed that while the word 'power' as a term of art has a meaning which is technically restricted, yet in a wide sense it covers the whole field of jural relations. In each of the eight enumerated categories (see Table, *supra*) *D* has a power over *S*.



While the term must for clearness have a restricted technical meaning to distinguish it from other related ideas, yet it involves a corollary of great importance in understanding the method of legal analysis. The central idea of law in a formal sense is force, power, dominion. This leading concept is carried down into all technical operations of the law. The corollary is the unilateral quality of all legal phenomena. All jural relations without exception exhibit this quality of unilateral power not only in their duration but also in their creation and ending. A simple illustration will suffice: *A* has the power to make an offer of contract to *B*. *B* has the power to accept. *A* has the power to revoke his offer before acceptance. *B* has the power to perform the contract and the power to destroy it (wrongfully) by non-performance. In all of these instances the determinative factor is unilateral. Also, during the continuance of the contract, both *A* and *B* may each mutually have claims against the other. It may especially be observed that while duty implies a legal condition of subservience, yet when it is performed, the performance is made by way of power.

*Duties are not exigible.* When it is said that one person has the capability to claim an act from another with legal effect, it must be noticed that such a claim is not exigible—it can not be compelled. The person owing a duty has the power to perform, but he also has the power to refuse performance. There is no way known to the law by which any claim can be validated through the compulsory act of the person owing the duty, if that person declines, against all the measures which may be brought to bear against him, to perform his duty. This may be illustrated in the case of so-called specific enforcement of contracts (claims). If *A* has agreed in writing and for a consideration to convey certain land to *B*, the law, if necessary, will grant specific enforcement of the contract. It is said, in loose language, that the law will compel *A* to convey the land; but, in truth, the law can not compel *A* to convey the land if he refuses to do so. It may issue an order that he do so, but he may still refuse. He may, perchance, be threatened with and suffer the penalties of contempt of court, but the necessary act will still remain unperformed. *B*, however, is not for that reason without remedy, since as a last resort, the court may direct an officer of the court to make the conveyance by a kind of official quasi agency transaction.

7. **Two-fold character of legal rules.**—Legal rules, therefore, have a twofold character: (a) They *prescribe* conduct—pointing out what, how, and when duties are to be performed; and (b) they *delimit* conduct—pointing out what, how, and when, powers may be exercised. As to the first kind of legal rules, institutional discussions of law usually emphasize claims and liabilities and subordinate duties and powers. In analytical discussion of legal propositions this method of attack is unproductive. For purposes of analysis of legal relations, the emphasis must be placed on duties and powers. The reason for this selection is that in all legal relations the active element is more important practically than a passive element. The content of a claim (right) is the duty to be performed. Proceeding from the standpoint of the claim is likely to give an erroneous notion of its nature and to lead to an absolutist view of its scope. This approach is useful for generalization, as in institutional works, but sterile for exact analysis when a concrete legal nexus is under discussion. Therefore, in the study of a concrete problem, the inquiry is not what right (claim) the plaintiff had, but what duty did the defendant violate. While what one person may claim from another is exactly equivalent to what must be performed, yet the results in legal reasoning are not likely to be the same, as one begins with the claim or the duty; since if the duty is not first sought and kept clearly in view, its qualified and changing character will usually be slurred over or submerged in the generalized idea of the claim. These remarks are especially applicable in the case of unpolarized (in rem) claims where the duty seems remote and unimportant because the persons owing the duty have not been identified in advance of a wrongful act. Claims, accordingly, assume in such cases an exaggerated importance which the actual details of a legal system do not warrant. This may be seen clearly in the case of ownership where an absolute quality has been attached to it which has been, and continues to be, a source of technical difficulty not only in private law but especially in the field of constitutional law.

In the second kind of legal rules, the active element, likewise, is emphasized—what one has the capability to do toward another (power) and not the corresponding liability.

**8. The power relation is a dynamic jural relation.**—While it is useful and desirable for juristic and legal reasoning to predicate a system of claims and duties, it is important to keep in mind that in the last analysis the force of the law is realized in the use of powers. The hortatory effect of mere existence of a legal prescription of duties is, in the great bulk of human activities, a sufficient safeguard of interests and claims. If this were not true, the law would break down with the weight of wrongdoing. But the hortatory effect of legal rules which prescribe conduct may fail and often does fail. In that case, the person whose claims have been injured must resort to the employment of power. If the one who owed the duty has not acted as the duty prescribed, then he to whom the duty-act was due must act against him, if he wishes to vindicate his claim. Thus, if the debtor will not pay his debt, the creditor has the power to proceed against him in the courts, or if the creditor happens to hold security he may without the aid of a court sell the security to satisfy his claim.

From this standpoint, it is possible to argue that the law is a system for the limitation of powers, since the law in its actual operation deals only with manifestations of power and not at all with duties which are juristic constructions whose chief function is to make legal phenomena intelligible and predictable.

**9. Freedom is the direct object of law.**—Whatever may be the ultimate aim or tendency of the law, its direct object is the attainment and maintenance of freedom—the natural capacity of each person to act for himself and toward himself without external restraint. All legal activities begin and end with freedom.

The owner of a chattel has freedom to use it in any manner he sees fit so long as he does not break the bounds of freedom and trespass on the domain of duty. The owner of a chattel has the power of assigning (offering) it to another who has the power to accept, whereupon the assignee of the chattel may now use it within the limits of freedom. Here we have a legal transaction which begins with freedom and ends with freedom through the exercise of mutual powers. Freedom is the terminus of all legal transactions. Freedom is maintained by prescribing a system of negative duties, i. e., to refrain from molesting the person who enjoys the freedom or the objects with which the liberty is connected. For example, the owner of land may use it as he sees fit subject to the limitation of contiguous duties. The law can not enlarge his liberty, since it rests on the natural capacity of the owner of the land to make such use of his land as he may, but

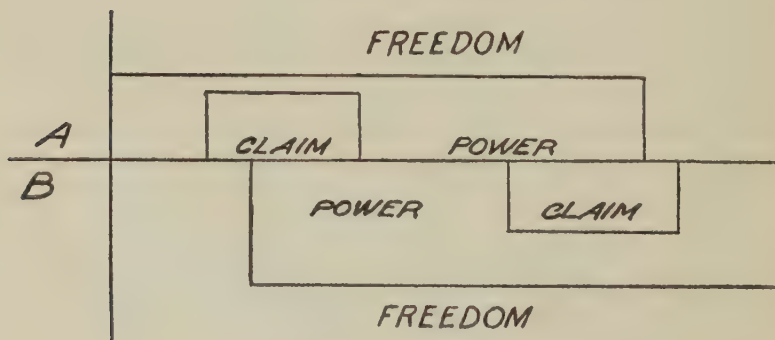
the law can protect his freedom (the external side of liberty) by commanding others not to interfere. On the other hand, freedom can be objectified through the positive acts of others by legal transactions, when the object of the freedom of one person is assigned to another; as, for example, when the land owned by *A* is conveyed to *B*. In some cases, especially in domestic relations, freedom is highly complex and unstable, requiring for its continuity a quickly changing series of positive and negative duties. Ownership of material objects, in comparison, is a relatively simple and stable legal institute. Freedom is fortified not only by duties, but also by powers. Thus, it is the duty of strangers to the land of an owner to keep off, but if a trespasser, contrary to his duty, goes on the land, the owner, by his own extra-judicial force, may remove him.

Since freedom is the base from which and for which legal transactions are entered into, the significance of the idea of jural relationship becomes apparent—a jural relation is a situation of fact upon which one may affect (through the existence and exercise of a power) or may claim to affect (because of the existence of a duty), the freedom of another with legal consequences.

10. **Juristic relation of freedom to claims and powers.**—The juristic relation of freedom, claim, and power in one person to the freedom, claim, and power of another may be illustrated by the following diagram:

TABLE NO. II

CONFLICTS OF FREEDOM, CLAIM, AND POWER





Freedom can never conflict juristically with freedom. Outside of the law, of course, such conflicts are numerous: for example, a banquet committee may require guests to wear dress suits. In the law, freedom may be in conflict with claims and powers. The full freedom of the land-owner is restricted by the duty not to maintain a nuisance on his land. Here the claim of the adjacent land-owner to be immune from the nuisance is a restriction of the freedom of use of the other owner. Notwithstanding his duty, the owner of land can create a nuisance which conflicts with the freedom of the adjacent owner, and, accordingly, power conflicts with freedom. But, in this case, the power to commit the wrong is met by the power to vindicate the original claim. The person whose freedom has been illegally invaded may either by extra-judicial force abate the nuisance, or he may resort to legal process—suit for injunction or an action for damages. Power may also conflict with power in an entirely different sense. *A* may have a power, but *B* may have a power to revoke it—e. g., revocation of an agency.

**11. Jural facts.**—Jural facts have a close connection with, but must be clearly distinguished from jural relations. In a wide sense, a jural relation is a jural fact, but the term jural fact has a special and narrower meaning. In the strict juristic sense *a jural fact is any act or event which creates, alters, or extinguishes a jural relation.*

The owner of a chattel may abandon it if he chooses, whereupon it will be subject to occupation by any person. The act of abandonment is a jural fact in two ways: it extinguishes ownership, and at the same moment it creates a multitude of powers in all persons (including the former owner) to occupy the chattel and become owner. The act, therefore, both extinguishes a jural relation (of the former owner) and creates new jural relations in all persons within the protection of the law. The former owner by his abandonment of the chattel has abrogated his claim to duties against other persons and his power to maintain his ownership; and likewise he has created a new power in all persons (including himself) to occupy the chattel and thereby to restrict, after occupation, the liberty of all other persons. The power which is created by the abandonment is only a contingent power. It can only be exercised by the first occupier, and there will be innumerable differences of opportunity to avail of the power; yet the law makes no distinction based on physical or factual opportunity. Each person within the pro-



tection of the law has an exactly similar power in the situation in legal contemplation, but when the power theretofore contingent is realized by occupation by one person, present claims and contingent powers are created in the occupier, and the contingent powers of all other persons are simultaneously extinguished coincidentally with the creation as against them of present duties and contingent liabilities with respect to the chattel.

The terms 'jural fact' and 'jural relation' are in no way convertible. Jural facts are causes; jural relations are effects. Jural relations, therefore, are the points of arrest, or dead-centers as it were, of legal phenomena. When put in motion, they become jural facts.

If a person defends himself against corporal harm by inflicting harm on the aggressor, a power is exercised which likewise is a jural fact in that the freedom of the aggressor is restricted, to the extent that he suffers a detriment. Since jural facts include events as well as acts, it is clear that not all jural facts are based on jural relations.

Jural facts are of the following kinds:

(1) The creative, alterative, and destructive occurrences in nature (e. g., birth, death, fire, etc., passage of time, separation of fruits, accretion, etc.).

(2) Duty acts, i. e., power acts in performance of a duty (e. g., tender of payment of money due).

(3) Contra-duty acts, i. e., power acts in violation of duty (e. g., failure to tender a debt when due; tort acts; criminal acts).

(4) Non-duty acts, i. e., power acts which are neither in performance of a duty nor in violation of a duty (e. g., offer of contract, performance of a condition, rescission, etc.).

**12. The idea of jural relation involves control of natural physical freedom.**—The definition of jural relation turns on a *control* of natural physical freedom through claims and powers. It should be noticed that jural relations have no direct connection with *liberty*. Liberty is an internal freedom of choice. Liberty can not be conferred. It is a fact outside the scope of the law. Liberty may be exercised, but it can not be given. It is a contradiction of terms to say that a liberty can be bestowed. Freedom is the external situation upon which liberty operates and it is upon that external situation that the law acts by means of

jural relations. Freedom may be bestowed or it may be taken away.

There are two kinds of jural relation one of which is illustrated by an enforceable duty to pay money where there is an immediate (conceptual) constraint on the servus with the support of the law. There is also another important kind of jural relation which may be illustrated by the following examples:

When a chattel is abandoned, all persons depending on their natural opportunity and capacity are free to take the chattel, but the act of abandonment did not create a liberty; it simply enriched its objective field. The act of abandonment, however, did create something—a contingent power, the contingency being that of prior occupation. The power had no existence anterior to the act of abandonment, but the liberty had a prior existence. Again, when a gift is made (offered and accepted), the donee has acquired not a new liberty, but an enriched freedom to use the object of the gift as he sees fit. If the owner of a chattel consumes it in use, a jural fact is presented; the owner's claims in the chattel against all other persons, are extinguished. If an offer of contract is made, the acceptance of the offer results in a (conceptual) constraint of one or of both parties. If one of the parties commits a breach of the contract, he will be constrained to pay damages.

In each of the above examples, there are one or more jural relations as follows: Power to abandon a chattel; power to occupy an abandoned chattel; offer of gift; acceptance of a gift res; consumption of a chattel; offer of a contract; acceptance of a contract offer; breach of contract. Each is a legal relation but of a type clearly distinguishable from an enforceable duty relation. In each there is involved, directly or indirectly, control of natural physical freedom with legal effect. Stated summarily, the characteristics of a jural relation in general including the type above illustrated are:

1. Two legal persons.
2. An act.
3. A definite legal effect following the act.



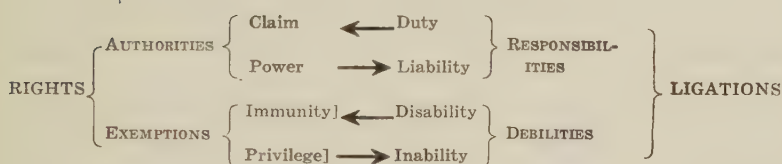
## CHAPTER II

### TERMINOLOGY OF LEGAL RELATIONS

- |                             |                    |
|-----------------------------|--------------------|
| 1. The basic relations.     | 3. Negative terms. |
| 2. The common denominators. |                    |

TABLE NO. I

#### LEGAL RELATIONS



1. **The basic relations.**—The above formulation is based on the view that legal rules and legal relations involve an element of actual or potential constraint. In order to show the element of constraint and for the purpose of making the Table familiar to the reader we shall take up each of the four basic relations separately.

(1) *Claim and duty are correlatives.* Where there is a Claim there must be a Duty. The terms are correlatives. One implies the other. The dominus (or holder) of a Claim has a capability<sup>1</sup> to constrain with the support of the law the servus (or bearer) of the Duty, to an act. That act may be positive or negative.<sup>2</sup> Thus if *S* owes *D* a sum of money, the Duty to pay is the Duty

<sup>1</sup> Capability is used in the sense of a concrete functioning of capacity. One may have a capacity for a given legal relation without being in that relation. Capacity is the juristic substrate of legal capability, just as an empty jug has the capacity of holding a given quantity of a liquid.

<sup>2</sup> In a narrow sense, an act is the objective result of a human reflex. In the above chapter, act is used in a wide sense to include all results which could be produced by a human reflex, or which may be attributed to the absence of an act in the narrow sense. For a full discussion of Acts, see Chapter XVI, post.

to do a positive act, i. e., to pay. Where *S* owes a Duty to *D* not to inflict a corporal hurt on *D*, the Duty not to inflict the harm is a Duty to perform a negative act, i. e., to refrain from the corporal harm.

The Claim that one has to an act from another must not be confused with the physical power of a person to act on his own account. A landowner has the Freedom to walk on his land. This is the landowner's act. He may have a Claim not to be molested by another, but that Claim is to the act of the other.

Freedom is not a legal relation because it is one-sided. A relation always involves two elements or two sides. Freedom is protected by the law by various Claims and Powers, but in itself it is not within the law. It is rather the end of law. Where Freedom ends the law begins, and where the laws ends Freedom begins.

The Claim-Duty relation is symbolized by an arrow. The arrow shows the direction of the act—from the servus of the relation to the dominus.

The terminology at this point is not novel. It is well authenticated in the professional speech of European jurists, although not widely familiar in America in the employment of the term Claim.

(2) *Power and liability are correlatives.* Where there is a Power there must be a Liability. The terms are correlatives. The dominus of the Power has a capability of acting against the servus of the Liability by restricting his freedom or by changing his existing legal position. The Power act may be positive or negative. Thus *D* by virtue of a Power of appointment may divest the title of *S* in Blackacre and invest *T*. Here the Power act is positive. Again where a will provides that title of Blackacre shall vest in trustees, and, if *D* does not use tobacco before he is thirty years of age, shall go to *D* in fee, otherwise to *T*, the Power act of *D* is negative.

Powers must not be confused with Freedom. If I read my own book, my act does not involve any other person, while a Power relation always involves a Liability of another person to be acted against.



The Power-Liability relation is symbolized by an arrow moving from the dominus of the Power to the servus of the Liability.

The terminology at this point is universally accepted.

(3) *Immunity and disability are correlatives.* Where there is an Immunity there must be a Disability. The terms are correlatives. The dominus of an Immunity may constrain the servus of the Disability from an act. Thus where *S*, a sheriff, has an execution, and *D* has filed a schedule of exemptions, *S* is disabled from making a lawful levy on the exempt property. Here the disabled act is a positive act. Immunities are commonly restricted to positive acts of disablement, but theoretically there is no reason for not also including negative acts.

The Immunity-Disability relation is symbolized by an arrow moving from the servus of the Disability to the dominus of the Immunity. This arrow is preceded by a bracket to show that the act can be obstructed. Thus the levy on exempt chattels can not lawfully be made. The act is obstructed by virtue of a rule of law.

It will be observed that the only difference between a Claim and an Immunity lies in the element of obstruction. Where a Claim exists, an act can be required. Where an Immunity exists, an act can be repelled. Theoretically there is no difference between a Claim and an Immunity. In a narrow sense, an Immunity is a special kind of Claim. It is a Claim which exists as a departure from the general rule. This seems to be the sense of the professional use of the term.

The terminology at this point is probably unobjectionable. It is not likely that better terms could be substituted.

(4) *Privilege and inability are correlatives.* Where there is a Privilege there must be an Inability. The terms are correlatives. The dominus of a Privilege may prevent the servus of the Inability from exacting an act from the dominus. Thus, where there is a so-called 'right' of deviation (the usual rule being that one must not trespass on the land of another) the dominus of the Privilege may decline the negative act of not going onto the land of the servus of the Inability. The owner

of the land is unable to require the other person not to go on the land. Here the legal Debility relates to a negative act.

Privileges in professional speech are usually limited to negative acts but theoretically there is no reason for not also including positive acts.

The Privilege-Inability relation is symbolized by an arrow moving from the dominus of the Privilege to the servus of the Inability. This arrow at the point of starting is preceded by a bracket to show that the act can be obstructed. Thus the negative act (not to go on the land) can not lawfully be required from the dominus.

It will be observed that the only difference between a Power and a Privilege lies in the element of obstruction. Where a Power exists an act can be done against another. Where a Privilege exists an act can not be required. Theoretically there is no difference between a Power and a Privilege. In a narrow sense, a Privilege is a special kind of Power. It is a capability which departs from the general rule, and on that is based the professional usage which attempts to differentiate the terms Privilege and Power.

The terminology at this point is in part new. The word Privilege is thoroughly domesticated in professional speech, but the word Inability probably has never been used consciously as the exact correlative of Privilege. If that is true, yet the explanation may be that the juristic nature of Privilege has not heretofore been sufficiently analyzed. If *D* has a license to walk on the land of *S*, and assuming that it is desirable to emphasize the negative of the negative act (i. e., no duty not to walk on the land) then *S* can not require of *D* the negative act (i. e., to stay off the land). *S* is unable to require the negative act. Inability therefore precisely expresses the idea. The word Disability is excluded on account of prior use and apart from that decisive consideration, it does not here express the right shade of meaning.<sup>3</sup> An examination of other synonyms fails to disclose a better term for the exact function indicated.

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<sup>3</sup> Disability implies deprivation or loss of power, i. e., because of a reciprocal Duty. Inability indicates inherent want of power, i. e., because of a reciprocal Liability. See Cent. Dict. s. v. Disability. Disability is often used in the sense of a want of Capacity. This is not fortunate; the proper word is Incapacity.

2. **The common denominators.**—It is believed that so far as two or more of the four specific legal relations above discussed have a common quality this quality is worth designating. In the first place, the lowest common denominators for both sides of the four specific legal relations are Rights and Ligations. In the next place, there are certain intermediate common ideas which are expressed by the correlatives Authorities and Responsibilities, and Exemptions and Debilities.

Claims and Powers are Authorities in which the superior legal position of the dominus is emphasized, Duties and Liabilities are Responsibilities in which the character of the Ligation is emphasized. The servus must respond to his Duty or to his Liability.

Exemptions are forms of Authorities. Where an Exemption is found the dominus can by reason of his legal position repel an act or decline one. The correlative clearly is Debility. The servus of the legal relation can not lawfully perform an act (Disability) or is unable to require one (Inability). The terms Authority, Exemption, and Responsibility are widely attested. They are common words in professional speech. The term Debility, however, as a law word, has not been encountered. Disability has been used generally either as a specific or as a generic term, but this is not admissible. The basic terms must *never be used as synonyms. They must have one and only one function, if our legal terminology is to be exact.* It is possible that a better word than Debility can be found, but we have not been able to discover another that expresses the right shade of meaning, and it is probable that among law words no other suitable term will be found. Debility accurately characterizes the legal position of the servus. It combines the ideas Disability and Inability. The lack of prior professional use of the term can not be a fatal objection unless a law word is available.

3. **Negative terms.**—The eight basic terms consisting of four pairs of correlatives should have an inflexible application. The terminology proposed is primarily intended for positive (affirmative) application, but there is also a need in speech to indicate the absence of (a) legal relation or (b) presence of

some other legal relation than the one which is the subject of discourse. This leads to a consideration of general negatives and specific negatives.

(1) *General negatives.* A general negative can be made of each one of the eight basic terms by prefixing the word No or Not. Thus Claim when negated becomes No-Claim. Duty when negated becomes No-Duty. It is possible by a method of juristic conversion to transmute each of the eight basic terms by a negation into another positive term of the eight.<sup>4</sup> By this method which involves some difficulty of analysis, a No-Claim is converted into Inability and No-Duty is converted into Privilege. We believe, however, the process of juristic conversion can never become useful in practical legal analysis as applied to the eight basic terms. When, therefore, any one of the eight basic terms is negated, the negation should stand as a *general* negative, and no inference should be drawn of any other legal relation. If a legal relation is present where another legal relation is negated, the existing legal relation should be affirmatively named. Thus, when speaking of No-Duty where there is a Privilege, the inference should not be that No-Duty is a Privilege, but the Privilege should be specifically affirmed.

(2) *Negatives with specific terms.* As already pointed out (and the great importance of the rule justifies its repetition) the eight basic terms should be manipulated only (a) in an affirmative application or (b) as general negatives without any inference in the negation of conversion into any specific legal relation. There is, however, a need apparent in the actual language of lawyers for the designation of general negatives by affirmative terms, and since the eight basic terms are excluded from this process, the four intermediate correlatives (Authority, Responsibility, Exemption, and Debility) may be drawn upon to fulfill the required function.

The need should first be illustrated. When one says that in

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<sup>4</sup> This method is explained in Chapter VII, post. This process must not be confused with logical conversion, obversion, or contraposition. Cf. (1914) *Sidgwick* "Logic" p. 87. It is specific in jurisprudence and may be called 'juristic conversion.'

a given legal situation *X* is free from a Duty, it may be said that *X* has No-Duty. There is a demonstrable tendency, however, to put it this way: *X* is ——— from duty. What word shall we insert in the blank? By the rule already stated, we can not put in Immunity. (This would be a misfit even by the method of juristic conversion.) Nor can we, because of the same rule, use the word Privilege. (This is the proper word by juristic conversion.) We must, therefore, search among the intermediate synonyms. Can we fit in the word Responsibility? Clearly not. Debility? Again, clearly not. We are therefore left only with the choice of Authority or Exemption. Let us recall the idea. There is no Duty to act. That signifies freedom from a burden. The right shade of meaning, therefore, is not Authority but Exemption.<sup>5</sup> We say accordingly that *X* is Exempt from Duty. The same process of solution will follow for each of the other eight basic terms when qualified by a general negative. It is not necessary to repeat this process in detail for each of the other basic terms and it will suffice to set out the respective conversions as follows:

TABLE NO. II

## CONVERSION OF INTERMEDIATE NEGATIVES

AUTHORITY	—	DEBILITY
DEBILITY	—	AUTHORITY
EXEMPTION	—	RESPONSIBILITY
RESPONSIBILITY	—	EXEMPTION

In detail as to the eight basic terms the converted negatives are applied as follows:

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<sup>5</sup> It should be noticed that Exemption, unlike Privilege, does not mean primarily a special advantage, but rather freedom from a burden. It, therefore, may include a special form of freedom from burden and be a major synonym for Privilege and Immunity.



TABLE NO. III

## NEGATIVES BY CONVERSION

Absence of CLAIM	= DEBILITY	= No AUTHORITY
" " POWER	= DEBILITY	= No AUTHORITY
" " DUTY	= EXEMPTION	= No RESPONSIBILITY
" " LIABILITY	= EXEMPTION	= No RESPONSIBILITY
" " IMMUNITY	= RESPONSIBILITY	= No EXEMPTION
" " PRIVILEGE	= RESPONSIBILITY	= No EXEMPTION
" " DISABILITY	= AUTHORITY	= No DEBILITY
" " INABILITY	= AUTHORITY	= No DEBILITY

As against any objection that may be raised to such difficulties, if any, as may be encountered in mastering these tables, it can only be answered that the law is the greatest practical science of human society; that the fundamental apparatus of this science is relatively simple as compared with the terminology and notation of the other sciences; and that if legal reasoning by reduction to a system of rigid basic ideas will make the administration of justice more rational in its technical premises, no effort can legitimately be spared in attempting to attain a scientific basis of legal discourse.

## CHAPTER III

### VARIOUS DEFINITIONS OF JURAL RELATION

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|--|---|
| 1. Difficulty of defining fundamental ideas. | 8. Bierling.                                  |
| 2. Savigny.                                  | 9. Puntschart.                                |
| 3. Merkel and Kohler.                        | 10. Criticism of Puntschart's theory.         |
| 4. Windscheid.                               | 11. Jural relation is a fundamental concept.  |
| 5. Terry, Salmond, Pound, Hohfeld.           | 12. Classes of definitions of jural relation. |
| 6. Austin, Holland, Capitant.                |   |
| 7. Thon.                                     |   |

1. **Difficulty of defining fundamental ideas.**—An inspection of the literature, and it is abundant, which attempts in one way and another to provide an understandable definition of jural relation, is likely to evoke the opinion expressed by Jhering in a similar connection—that the pursuit is a trading of silver dollars for paper dollars.<sup>1</sup> But the diversity of views on this fundamental notion is quite tolerable when we recall that the nature of the chief type of jural relation, a 'right,' is still a subject of animated debate. The last edition of Windscheid's "Pandekten," in the chapter on "Rights" exhibits eight full pages of solid type of footnotes referring to scores of treatises and monographs containing discussions which oscillate between the interest theory and the will theory.<sup>2</sup> The list of disputants could at the cost of little effort be considerably increased.<sup>3</sup> The basic idea,

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<sup>1</sup> Jhering "Geist des römischen Rechts" (5th ed.) IV (Dritter Teil, erste Abt.) 327, n. 435: "Among such definitions one exchanges a silver dollar for a paper dollar, and is as far along afterwards, as before. What is a right? 'The power to act, etc.'—here one acquires a paper dollar instead of a silver dollar. What is a power? 'The right to act'—there one gets his silver dollar back."

<sup>2</sup> Windscheid "Lehrbuch des Pandektenrechts" (9th ed.) I, ii, (i) pp. 155 seq.

<sup>3</sup> Cf. Pound "Legal Rights" in Int. J. of Ethics (Oct., 1915) pp. 92 seq., and see, especially, footnotes pp. 114-116.

law, fares no better—"Noch suchen die Juristen eine Definition zu ihrem Begriffe vom Recht."<sup>4</sup> The more fundamental the idea, the greater seems to be the difficulty of definition, or what amounts to the same thing, clarity of thought.<sup>5</sup> It is true, nevertheless, that the difficulty is often avoided as unworthy, and it must doubtless be conceded that in the practical application of legal science, ultimate precision of thought is rarely needed.<sup>6</sup> But whatever may be the attitude to these matters in the art of the law, and however formidable may be the difficulties of attaining solid ground, the science of law can not abdicate its conscience or disregard its logical mission of searching, in the language of Hobbes, for "perspicuous words, but by exact definitions first snuffed and purged from all ambiguities."<sup>7</sup>

2. **Savigny.**—The term 'jural relation' scarcely finds a place in books written in English, and in none of them does it receive systematic treatment.<sup>8</sup> Passing, therefore, to the available discussions, we may begin with Savigny.

<sup>4</sup> Kant "Critique of Pure Reason" (Kerbach ed.) p. 560; Meiklejohn's tr. (London 1893) p. 445.

<sup>5</sup> As Reichel has stated it—"Tot capita, tot sensus. Nearly every jurist or philosopher who has reflected on the law has made his own definition. One may compare by way of illustration the variegated assortment of definitions of law collected by Rümelin and by Trendelenburg as well as in the monograph of Baumstark (*Was ist das Recht?*): H. Reichel, in Krit. V-j-Schr. f. Gesetzgebung u. Rechtswiss., Dritte Folge (1907) XI, 211. For a recent attempt to do what at least one writer says is an impossibility (e. g., Terry "Leading Principles of Anglo-American Law" p. 3) see Lévy-Ullmann "Éléments d'introduction générale à l'étude des sciences juridiques, I: La définition du droit" (Sirey, Paris 1917).

<sup>6</sup> See the remarks of Austin, on the lack of definitions in the French and the Prussian codes ("Jurisprudence" II, 692, 1070, 1110). Jhering has also remarked that the Roman jurists manipulated their ideas "with the greatest security, in spite of the frequent insufficiency of their definitions": "Geist" (5th ed.) III (II2) 364.

<sup>7</sup> An interesting, but debatable substitute for definition is offered by an American jurist, Prof. Wesley N. Hohfeld "Some Fundamental Legal Conceptions as Applied to Judicial Reasoning" Yale Law Journ., 23: 16, 30: "The strictly fundamental legal relations are, after all, sui generis; and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line seems to consist in exhibiting all of the various relations in a scheme of 'opposites and correlatives' \* \* \* \*"

<sup>8</sup> Terry uses the term as applicable "either to duties or their correspondent rights": "Leading Principles of Anglo-American Law" (1884) p. 90. Waiving any objection here to Mr. Terry's category of "correspondent" rights, the term 'jural relation' is here too restricted for scientific use.

Savigny speaks of jural relation as "a relation between person and person, determined by a rule of law. This determination by a rule of law consists in the assignment to the individual will of a province in which it is to rule independently of every foreign will."<sup>9</sup>

The provinces according to Savigny in which the mastery of the will is conceivable are: (a) The self—a field excluded as not belonging to the law; (b) the self expanded in the family—a field partly in the law; and (c) the external world which falls entirely in the law and is subdivided into the law of things and the law of obligations.<sup>10</sup> What Savigny clearly has in view is, chiefly, if not entirely, that type of jural relation which involves a correlative duty, 'claims' or so-called 'rights' in a strict sense.<sup>11</sup> Elsewhere he speaks of "the jural relation of which each individual right shows a particular side separated from it by abstraction \* \* \*"<sup>12</sup> indicating as it would seem, that the distinction between jural concepts and legal concepts is only the familiar logical separation of general and special terms. Quite apart from this discussion, it may be noticed, incidentally, that the concrete right is disengaged by abstraction. The "living form" of the jural relation is contrasted with the "bare mechanics" of the legal relation—an attitude thoroughly consistent with Savigny's mystic theory of the nature of law but entirely sound in the sense that a jural relation is the conceptual representative of an underlying material state of fact.<sup>13</sup>

Savigny does not undertake to discuss systematically any other type of jural relation than claims (rights in the strict sense), but his contribution is interesting as one of the relatively early discussions in a field which has only in recent decades found

<sup>9</sup> "System des heutigen römischen Rechts" II, § 52 (Holloway's trans. p. 271).

<sup>10</sup> *Op. cit.*, II, § 53.

<sup>11</sup> 'Subjektives Recht,' 'Anspruch,' 'pretensione,' 'droit-pouvoir,' 'Ken-ri,' 'pravomochia.'

<sup>12</sup> *Op. cit.*, I, § 4.

<sup>13</sup> At least one type, if not the prevailing one, in juristic theory, takes a contrary view, regarding the concrete instance or any other legal phenomenon as the living reality, and any juristic construction beyond that as unreal, artificial, and mechanical. But, however that may be, the distinction between general and special concepts (e. g., jural relations and legal relations) is worth preserving.

extensive treatment. The chief criticism of his definition lies in this, that it is nebulous and descriptive, and that it does not deal with ultimate juristic ideas. To say that the will "is to rule independently of every foreign will" is indefinite. The term *rule*, especially, needs further reduction. Furthermore, even as to claims (rights in the strict sense) the will does not rule; it is not an exigible will, since it may successfully be opposed by power. Yet Savigny's statement comes close to the truth for any type of jural relation. It correctly emphasizes the power element in jural relations<sup>14</sup> and with some alteration in the direction of concreteness it can, no doubt, be logically adjusted to the facts of legal science.<sup>15</sup> It is not only one of the earliest but also one of the most satisfactory definitions.

3. **Merkel and Kohler.**—When we pass from Savigny to recent definitions we find, as Professor Kipp has remarked, that they present no material variations,<sup>16</sup> and, as he might have added, that they have, with few exceptions, little direct value.

Merkel states that a jural relation consists of a power on one side, and a duty on the other.<sup>17</sup> This, of course, is clearly incorrect, since, for example, a power to divest a claim (e. g., ownership of land) involves no corresponding burden to assist in its exercise. Merkel distinguishes between claims (which he denominates individualized legal powers) and liberties, but his discussion takes no account of power (*'Befugnis'*) in the

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<sup>14</sup> Jhering, with his usual penetration, lays stress on this point. "The specific juristic element of jural relations in ancient Roman law was the power concept." "The content of every jural relation \* \* \* is will or power; the differences of jural relations are differences of powers." "Geist" (5th ed.) II (II 1) 140.

<sup>15</sup> For a criticism of Savigny's analysis from another viewpoint, see *Bierling* "Juristische Prinzipienlehre" (Leipzig 1894), I, 191, "Kritik der juristischen Grundbegriffe," II, 129. See also, *Puntschart* "Moderne Theorie des Privatrechts" (1893) p. 5. Puntschart argues that if a jural relation can only be realized in concrete rights, then the right is the prius and the jural relation only the posterius. It is probable, however, that Savigny's definition is closely bound up with his theory of law, as suggested, and, in that case, he is not guilty of the logical fallacy charged.

<sup>16</sup> *Windscheid* "Pandekten" (9th ed.) § 37a, n. 1, p. 166.

<sup>17</sup> "Juristische Enzyklopädie" (3rd ed.) § 146 sq.; "Elemente der allgemeinen Rechtslehre" § 20 sq.



technical sense.<sup>18</sup> The only useful addition to legal science is his distinction of simple and complex jural relations—jural relations which have powers on both sides growing out of the same juristic fact.

Merkel's distinction between simple and complex relations seems to be the basis of various recent definitions. Kohler,<sup>19</sup> whose presentation of the matter is, on the whole, the clearest statement to be found, says a jural relation is [includes]<sup>20</sup> a right, but that it is more than a right. It is that kind of right which is not reducible to a fixed pattern during its existence; that is to say in the origin of the relation and in its subsequent life history, it is subject to the play of individual influences. Thus ownership is a right but it is not a jural relation. Again a [contract of] sale involves rights but not a jural relation because it is instantly extinguishable by simple performance. The same also is true, he says further, of a mutuum without interest; but the contrary is true of a mutuum with interest, or of a lease, because it involves a series of constantly changing duties. Further illustrations of jural relations are the contract of service, and, chiefly, partnership. Obligation rights while involving some elements of individual play, he thinks are too much fashioned by form to be regarded as fair types of jural relations.

While lack of clearness of expression and a spirited style can not be charged to Kohler, yet it may be objected that a valuable juristic term is here sacrificed for a poor end. It is useful to distinguish simple and complex relations, and it may, perhaps, be desirable to sever the type of complex relations into further groups; but to designate certain types of complex relations as

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<sup>18</sup> Merkel is closely followed by *Grueber* "Einführung in die Rechtswissenschaft" (2d ed.) (Berlin 1910) § 4, p. 29. Prof. Grueber has benefited by Bierling's discussion of norms ("Juristische Prinzipienlehre") but he seems to have overlooked his analysis of jural relations.

<sup>19</sup> "Lehrbuch des bürgerlichen Rechts" (Erster Halbband) 1904, §§ 4 sq., 44 sq.; also his "Einführung in die Rechtswissenschaft" (2d ed.) § 7.

<sup>20</sup> For the significance of this amendment, see the criticism of the 'relation' theory of rights by *Roscoe Pound* "Legal Rights" *Int. Jour. Ethics* (Oct., 1915) pp. 112 sq. There is, no doubt, a distinction to be kept in view, in a discussion of rights, between the specific juristic possession of the person entitled,—interest, capability to control an act, claim—and the entire sum of the elements including the duty (content). For the purposes of this inquiry, the relation alone is under consideration.

jural relations, and others as merely rights, does not appear serviceable.<sup>21</sup>

Kohler clearly marks off *powers* from *claims*, but he appears to include in *powers* the concept of *liberty*. This also is objectionable. Power relations are one of the only two types of generic jural relations, but liberties are not jural in their nature, and the converse of the criticism is here applicable. Where before the term jural relation was sacrificed for a narrow species of jural relation of little importance, here one term is used where two terms are called for, both being of major value in juristic analysis. The defect, however, is not one of understanding, but of application.<sup>22</sup>

4. **Windscheid.**—Windscheid's analysis has an importance which is reflected by the institutional authority of his book and his recognized learning rather than by intrinsic merit. As a definition it exemplifies in exaggerated form Jhering's description, to which reference already has been made. It is not a case of trading a silver dollar for a paper dollar, but of giving one paper dollar for another. It is a true type of the 'circulus in definiendo.' "A jural relation," says Windscheid, "is a legally defined relation."<sup>23</sup> There are two types: first, those created by law, of which ownership is an example; and, second, a situation of fact to which the law attaches legal consequences—for example, possession. If we apprehend Windscheid's point, is not this a distinction without a difference? It is true that the law does not create the *fact* of possession, but if possession is anything more than a fact—if it is not a bare non-legal situation<sup>24</sup>—if it carries with it a legal control over the acts of others,—then how does it differ from ownership which is also based on a situation of fact? The explanation of the distinction seems to be that Windscheid is attempting to straddle the division made by Savigny and by Puchta between relations of fact and relations

<sup>21</sup> Sternberg's definition ("Allgemeine Rechtslehre" II, § 4, p. 51, n. 1) is more definitely related to Merkel than is Kohler's.

<sup>22</sup> See "Lehrbuch d. b. Rechts" I, § 4.

<sup>23</sup> "Pandekten" (9th ed.) I, § 37a, p. 165.

<sup>24</sup> For an important discussion of "jural conditions" (e. g., capacity, agency, etc.) see Kohler "Lehrbuch d. b. Rechts" I, § 49.

of law.<sup>25</sup> But the two parts or elements of jural relation can not be straddled for any scientific purpose, since in effect, Windscheid's distinction amounts to saying that jural relations can be created in some cases (e. g., ownership) without any material element of fact.<sup>26</sup> The real importance of the division made by Savigny and by Puchta lies in another field of juristic debate—whether the law is a system of legal rules or of jural relations.<sup>27</sup> Windscheid clearly distinguishes claims (control over a positive or negative act of another) from powers (that is, power to assign, of rescission, etc.). Like Kohler, Windscheid includes under powers the non-jural concept of liberty. Thus, in his discussion of ownership,<sup>28</sup> as pointed out by Thon,<sup>29</sup> he says that ownership means that the owner's will is determinative over an object in the totality of its relations, consisting of claims and powers. Among the powers of the owner is that of use. Thon's criticism of this passage has stood for many years, and yet the last edition of the text of Windscheid remains unaltered. It is not our purpose at this time to attempt a demonstration of the point that liberty (apart from the rights connected with it) is not a jural concept. Indeed, in the light of what is available on that question, the labor might be considered one of super-erogation.

5. **Terry, Salmond, Pound, Hohfeld.**—It is worth noticing in this connection that Windscheid names two and only two jural relation concepts. The tendency of recent American and English analysts is to find three and sometimes four fundamental jural ideas of the same generic order. Thus, Terry discusses in detail four kinds which he denominates correspondent rights, permissive rights, protected rights, and facultative rights.<sup>30</sup> Sal-

<sup>25</sup> *Savigny* "System" II, § 52: "A jural relation is made up of two parts. \* \* \* The first may be called the material element of the relation—the situation of fact; the second, the formal element by which the situation of fact is elevated into the plane of law"; *Puchta* "Pandekten" § 29.

<sup>26</sup> *Gareis* "Science of Law" p. 31, n. 1.

<sup>27</sup> *Windscheid* "Pandekten" (9th ed.) I, § 13.

<sup>28</sup> *Op. cit.*, § 167, p. 857.

<sup>29</sup> "Rechtsnorm und subjektives Recht" p. 289.

<sup>30</sup> "Leading Principles of Anglo-American Law" §§ 113-128.

mond, criticizing Terry's category of protected rights<sup>31</sup> as meaning only the objects of rights, enumerates three concepts—'rights,' powers, and liberties.<sup>32</sup> Pound<sup>33</sup> finds three such concepts—'rights' (corresponding to duties), powers (capabilities of creating, divesting, or altering rights), and privileges (exemption from liability). The Yale group under the leadership of Hohfeld<sup>34</sup> has invented a new classification of these ideas which is notable for the energetic application which has been made of it. The Hohfeld classification is rights, privileges, powers, and immunities.

6. **Austin, Holland, Capitant.**—Since until recent decades, the treatment of this somewhat complicated matter has been scanty and in the main unsatisfactory in the Pandekten books, the older English texts on formal jurisprudence (which have mainly drawn their material from the Pandect books) such as that of Austin, and in more recent times that of Holland, go no further than a discussion of 'rights' in the strict sense. Insensibly, however, these discussions shift ground unless the other ideas are clearly marked out. Thus, for example, Holland's definition of a legal right<sup>35</sup> taken in connection with his explanation of what his definition means seems to confuse wholly unlike though related ideas. A similar illustration may be found

<sup>31</sup> "Jurisprudence" (3rd ed.) § 76, p. 197, n. 1.

<sup>32</sup> *Op. cit.*, ch. X, pp. 182 sq.

<sup>33</sup> "Readings on the History and System of the Common Law" (2d ed.) p. 413; "Introduction to Study of Law" § 6. Cf. also, by the same author "Legal Rights" (Int. Jour. Ethics (Oct. 1915) p. 111 sq.) in which, in criticism of Bierling's classification into *Anspruch* (claim), *Dürfen* (liberty), and *Können* (power), the author (*Pound*) proposes to separate *Dürfen* into what it already is, liberty, and into privilege (e. g., 'right' of deviation).

<sup>34</sup> See footnote 7, *supra*. Cf. also *Corbin* "Legal Analysis and Terminology" Yale Law Journ. 29: 163.

<sup>35</sup> "Jurisprudence" (13th ed.) pp. 83 sq. Holland defines a legal right in what he says is the "strictest sense of that term," as "A capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others." This is closely followed by an illustration not of a *right* (claim), but of a *liberty*—"the ownership of land is a power residing in the landowner, as its subject, *exercised over the land*, as its object, and available against all other men." This illustration is not decisive on account of the ambiguity of the words italicized, but the explanation of the author (p. 86) removes all doubt—"If a man by, etc., *can carry out*



in the elementary institutional French work of Capitant.<sup>36</sup> Whatever else may be said about it, it is clear enough that concepts so necessary for accurate legal reasoning and scientific discussion should be relieved, if possible, from the perplexity which embarrasses progress in analytical thinking, and is even obstructive to communication of thought.

7. **Thon.**—One of the most lucid and original works in the field of this inquiry is that of Thon.<sup>37</sup> This book is of importance even though the term 'jural relation' nowhere appears in it. Thon's book, which was professedly suggested by the celebrated treatise of Binding,<sup>38</sup> deals with norms as applied in private law. In agreement with Binding, and likewise with our not quite obsolete theory which goes back to the absolutism of Hobbes, Thon asserts that "all law consists of imperatives"—commands and prohibitions.<sup>39</sup> Commands result in the alteration of legal relations and prohibitions aim to maintain them. Commands involve a future use of a thing; prohibitions protect a present use.<sup>40</sup> While the point appears not to be categorically stated, it is evidently the author's purpose to show the fundamental concepts through which the law operates to achieve its object. The basic categories which are examined in detail are claims (*Anspruch*), liberties (*Genuss*), and powers (*Befugnis*). Thon seems one of the first writers to sharply mark out liberties and at the same time to state their juristic significance. Liberty, as he shows, is a non-jural idea except that its exercise may become of legal consequence under circumstances of misuse or

*his wishes, etc.*" If, perchance, as must always be possible when dealing with mere words, the explanation has a meaning beyond the grammatical sense, it may still be objected, that failure clearly to distinguish right from its cognates is confusing in a discussion which employs terms pointing to other meanings.

Similar objections may be made to Prof. Gray's discussion of rights. *Gray* "Nature and Source of Law" (2d ed. 1921) pp. 18-19.

<sup>36</sup> "Introd. a l'étude du droit civil" (2d ed.) Paris, 1904, pp. 3, 74; "Le droit subjectif est un intérêt, d'ordre matériel ou intellectuel protégé par le droit objectif, qui donne, à cet effet, à celui qui est investi, le pouvoir de faire les actes nécessaires pour obtenir la satisfaction de cet intérêt."

<sup>37</sup> "Rechtsnorm und subjektives Recht" (Weimar, 1878).

<sup>38</sup> *Normen unter ihre Übertretung* (1872-1877).

<sup>39</sup> *Op. cit.*, *passim*; p. 69 (summary).

<sup>40</sup> *Op. cit.*, p. 288.



non-use.<sup>41</sup> In other words, while liberty within its own proper limits, is non-jural, it may break its bounds, or, negatively, it may become a juristic fact by which rights are created in others. A landowner whose rights have been invaded has a claim against the trespasser, but the law does not require the owner to make any use of his land—such use or non-use (within limits) is a matter of liberty.

Rights, according to Thon, are not protected interests (Jhering),<sup>42</sup> but the means by which interests are protected. They rest on the promise of an eventual claim.<sup>43</sup> Claims are complexes of 'rights' and powers—rights against judicial and other officers, and powers to proceed against the wrongdoer. A claim (*actio*, *interdictum*) does not arise until there is an infringement of a norm. At the same moment of infringement there arises also the so-called 'right of suit' ('*ius persequendi in iudicio quod sibi debetur*'). The term claim includes 'right of suit'<sup>44</sup> which is the principal modern substitute for the ancient remedy of self-help. Since claims, including 'rights' of suit, involve no jural relations other than rights in the strict sense and powers, and

<sup>41</sup> Op. cit., p. 323. The definition of Justinian is in point—"Et libertas quidem, ex qua etiam liberi vocantur, est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut jure prohibetur": *Inst.* I, 31.

<sup>42</sup> "Geist" III (III 1, p. 339) § 60 sq.

<sup>43</sup> Op. cit., p. 218 sq.

<sup>44</sup> The jural nature of '*Anspruch*' and '*Klagrecht*' is a matter of considerable discussion: see Thon "Rechtsnorm und subjektives Recht" 257 sq.; for the literature and Windscheid's statement, see his "Pandekten" (9th ed.) §§ 43, 44, 122. The Anglo-American treatment of the subject does not touch the difficulties which apparently have been found in it by continental jurists. The Anglo-American term, 'remedial rights' (*Holland* "Jurisprudence" (13th ed.), chaps. XI, XII, XIII) covers the same ground. Prof. Beale "A Treatise on the Conflict of Law" (1916) part 1, seems to find three stages in the situation of a right holder whose rights have been infringed—a primary (sanctionable) right (e. g., to have payment of a debt), a secondary (sanctioning) right (to have payment from the debtor before action of damages for failure to pay the debt), and a tertiary right (to have procedural damages). Unless modern law in this regard is still under the spell of the time when executive justice was weak (cf. *Lex. Sal. tit. I*) it seems unnecessary to have a third right which supplants two other earlier rights; although it would seem in those cases where a demand is necessary after default, there is still a reminiscence of an earlier stage of procedure when the law was full of checks, through the requirement of repeated notices and demands, on the hot blood of the litigant. See, also, the pertinent discussion by Terry "Leading Principles of Anglo-American Law" of the obligation and permissive theories of remedial rights.

since, furthermore, liberty is non-jural, it follows that there are only two <sup>45</sup> kinds of jural relation,<sup>46</sup> each having many species.

8. Bierling.—Bierling's <sup>47</sup> analysis of jural relation also is the product of a norm theory. His treatment of the subject is not unlike Thon's, except that the latter is more definite in detail and less given to abstractions; but Bierling's discussion is of

<sup>45</sup> If the view of *Schlossman* ("Der Vertrag") be accepted that the law consists only of *Ansprüche* (see *Thon* "Rechtsnorm und subjektives Recht" 170) then there is only one type of jural relation, i. e., power. The view that the law consists, in strictness, only of remedies does not seem to be accepted or widely discussed. It may, perhaps, still be justified by taking a distinction between the strict field of law and the constructions of legal science. Legal science finds it convenient to project a system of rights in order that the phenomena of state justice may be made comprehensible. The law, however, is under no such necessity. It need not go, and does not go, beyond its own activities. In the words of Jhering "the function of law is manifestation. What is not realized is now law": "Geist" (6th ed.) I, § 4, p. 49. The existence of an important field of non-contentious jurisdiction offers no real obstacle to the view. These activities by the state are in aid of its social purpose, but they are no more in the field of strict law than are its administrative functions in maintaining an army, or a hospital. The most generalized formula of legal activity is that stated by Jhering ("Geist," I, § 4, p. 52, n. 20—this author, of course, is not offered as an authority on the chief question, especially since his definition of right is one of the leading ones accepted in legal science)—which formula is, "If—Then"; *If* one does this or that, *then* such and such consequences will follow. This formula may be applied to all remedies. In a word, the actual field of law is as distinct from a system of rights, or even a body of rules, as space is distinct from geometry. Cf. the remarks of *Terry* "Leading Principles of Anglo-American Law," § 132, that in the view of Roman institutional writers there are no primary (sanctionable) rights in rem, nor, on the other hand (§§ 132, 143) any sanctioning (remedial) rights in personam. It may also be noticed in this connection that some continental jurists deny certain sanctionable rights—in one's own person (e. g., corporal integrity); thus *Enneccerus* ("Lehrb. d. bürgl. Rechts," I (1) p. 164, I (2) p. 591)—"Personality is not a right but an indestructible quality of the person." See, also, B.G.B., §§ 823 sq.

<sup>46</sup> It will hardly need to be pointed out that this is not Thon's statement but the present writer's inference. Thon, as it seems to us, labors under the difficulty of making a convincing demonstration of his leading proposition that all law consists of imperatives, when he comes to his analysis of powers (see especially, op. cit., p. 346). It is true, the exercise of a power may be prohibited (e. g., a wrong) and, on the contrary, its exercise commanded (e. g., *cessio necessaria*); but it is difficult to see how a discretionary power of appointment, for example, can be regarded, when separated from its effects, if and when exercised, as subject to an imperative, i. e., commanded or prohibited. The true explanation is that these are introductory parts of complete imperatives.

<sup>47</sup> "Kritik der juristischen Grundbegriffe" (1877-83); "Juristische Prinzipienlehre" (1894-98).

more specific utility for our purpose since he presents a clear-cut definition of jural relation.

"All legal norms," says Bierling,<sup>48</sup> "express the content of jural relations, that is to say, relations between persons entitled and persons bound." Jural relations, therefore, consist of claims on one side and duties on the other. Bierling substitutes the term '*Anspruch*' (claim—widest sense) for right ('*subjektives Recht*') to avoid the difficulties of the narrow use of '*Anspruch*' found in the discussions of civilians. *Anspruch* includes every act which legally must be performed by another. Liberty (*Dürfen*) means a negative situation where there are no opposing legal norms. Power (*Können*) is a legal concept only in so far as it includes within its ambit, claims or duties.<sup>49</sup> We speak of 'rights' against others to have a positive act (performance) or a negative act (forbearance). This use of the term is identical with *Anspruch* (claim). In another sense, we speak of the 'right' to do or not to do something. This is *Dürfen* (liberty). There is no duty of the person having the liberty nor any duty on the part of others.<sup>50</sup> In a third sense, we speak of a 'right' to act with certain consequences. This is *Können* (power).

Bierling attempts to show by examples that powers are complex ideas, and asserts that only so far as they include claims are they to be considered as having a jural character.<sup>51</sup> Thus, where a donor of a gift rescinds, the donee owes what Bierling calls a "limited legal duty" to return the gift to the donor. Again where a 'res nullius' has been acquired by 'occupatio,' there is a "limited legal duty" due from others to recognize the investitive fact and to refrain from disturbing the occupant.<sup>52</sup> Bierling's

<sup>48</sup> "Prinzipienlehre" I, 145 sq.

<sup>49</sup> See the discussion of Bierling's analysis by Pound "Legal Rights" Int. Jour. of Ethics (Oct. 1915) pp. 111 sq.

<sup>50</sup> *Del Vecchio* ("Forma" Bases of Law" Lisle's trans., p. 186, n. 6) criticizes this statement: "In no way can a practical power or right be given without the illegality of its interference being determined by the same system."

<sup>51</sup> "Prinzipien" I, 180, 183.

<sup>52</sup> If Bierling means to say that these acts have sides—a power side and a claim side—then there is no difficulty. There may be a *power* to rescind a juristic act. The exercise of this power is not correlated by any duty to assist. There is a correlate, however, which according to the terminology of *Salmond* "Jurisprudence" (3rd ed.) p. 197, accepted by *Hohfeld* (Yale

formal definition of jural relation is "a relation between a plurality of persons, whose content is formed by one or more legal norms," or, more briefly, a jural relation is a "correlate relation of legal claim and legal duty." Liberty (*Dürfen*) and power (*Können*) are therefore excluded from the sphere of jural relation concepts.

One more rapid survey of a recent review may suffice.

9. **Puntschart.**—Puntschart in a brilliant essay<sup>53</sup> arrives at an entirely different conclusion as to the nature of jural relation, from the series beginning with Savigny. He puts aside '*Rechtsverhältnis*' as not a term of art and substitutes '*Rechtsverband*' (jural bond) derived from 'juris nexus' and 'juris vinculum.' He insists that the modern theory of private rights derived from Natural Law has wholly misconceived the fundamental Roman basis of jural ideas. A system of rights is the very cornerstone of modern theory. In Roman law, while there was a definition of 'actio,' there was none of 'jus' in the sense of rights.<sup>54</sup> In the Roman application of legal ideas, norms related to persons, to things, the relations of persons to things and to other persons, and this application of legal norms created legal bonds by which persons were gyved to persons and persons to things for definite purposes within the purview of the law. The author shows by copious references how the 'bond' idea runs through the whole system of Roman legal conceptions (that is, jus, lex, contractus, servitus, etc.). Rights are not the basis of legal construction in the Roman system, but they are only the products of a fundamental jural bond. The jural bond, therefore, is the fulcrum of Roman legal technic. In modern theory, a system of rights is taken as the basis of legal thinking, and the result has been, as the author attempts to show in detail of a variety of legal institutions, a multitude of juristic questions which are

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Law Journ., 23: 16, 30) may be called a liability. When the power is effectively exercised, but not a moment before, a right may spring into existence which is correlated by duty. Cf. the criticism by Del Vecchio, *supra*, note 50.

<sup>53</sup> "Moderne Theorie des Privatrechts" (1893). See also his "Fundamentalen Rechtsverhältnisse des römischen Rechtes (1885).

<sup>54</sup> Quoting, *Bekker* "System d. heut. Pandektenrechts," I, 46, n. 1.



debated with great industry but with irreconcilable issue. Accordingly, the whole theory of modern private law is falsely bot-tomed, and needs reconstruction.

Puntschart thinks that Savigny had already vaguely apprehended the 'juri*s vinculum*' concept in his somewhat indefinite reference to the organic nature of the jural relation.<sup>55</sup> Punt-schart also supposes that Jhering,<sup>56</sup> Köppen, Karlowa, and, espe-cially, Bekker, were driven by the difficulties of the modern theory, to construct other ideas which would more appropriately answer the demands of legal technic. This attempt to restate the foundations of legal reasoning led to an identification of rights with jural relations, and of jural relations with law. This is seen particularly in the juristic discussion of the origination, duration, and alteration of rights where the question is, what is it, for example, that is altered, when one speaks of an altera-tion of rights?—is the right altered, or is the jural relation altered? Punschart argues that the technical difficulties pre-sented by these and similar questions are removed by falling back from rights and jural relations to the idea of a jural bond which is also a "purpose bond"—the bond endures as long as it has any purpose to fulfill. The modern world is still governed by the 'will' theory developed in the school of Natural Law and fixed as a philosophical doctrine by Hegel, notwithstanding the efforts of Jhering to infuse into the law a realistic trend. But even Jhering himself did not depart from the conventional legal method in dealing with what he called the internal technic of the law. He still continued to operate with the idea of rights.

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<sup>55</sup> Thus *Savigny* "System" (Holloway's trans.) I, § 4: "The jural rela-tion has moreover an organic nature and this reveals itself partly in the coherence of its constituent parts, balancing and limiting one another; partly in the gradual unfolding which we recognize in it; partly in the mode of its arising and passing away."

<sup>56</sup> Citing *Jahrb. f. Dogmatik*, X, 387-580, where Jhering states that the law has an active and a passive phase. The passive phase of law is that situation of fact where a subject or an object of a legal relation is for the time being not in existence (p. 580). It is the situation of "Gebundenheit" (constraint), of a person or thing—in a passive sense. The active phase is that where all the elements of a presently effective legal relation are in existence. The active phase follows from the passive phase. The passive phase, therefore, is the "prius." (Cf. note 15 supra.) See *Puntschart* "Moderne Theorie" pp. 6 sq.



The effect of Puntschart's theory is to emphasize duties as was characteristic of the Roman system, instead of 'rights.' He recalls in this connection the often quoted words of Modestinus—"legis virtus haec est: imperare, vetare, permittere, punire." But Puntschart apparently does not propose to abolish the concept of rights. It has remained for a more recent writer, Duguit, to say:

"The concept of subjective right falls entirely to the ground. It can be truthfully said that such a metaphysical conception can not be maintained in an age of realism and positivism such as our own."<sup>57</sup>

Rights if not abolished are at least made subordinate in Puntschart's system to the idea of jural purpose bond. This is shown in his examination of the theoretical difficulties regarding the nature of ownership. "Ownership is that legal bond of a thing with a person by which the thing is appointed to serve *all* the purposes of the person, which can availably be realized."

He then proceeds to define a right of ownership as—"the sum of legal powers which spring from the ownership bond to use a thing for all the purposes of the person which can availably be realized."<sup>58</sup>

This illustration is as good as any other which may be extracted from Puntschart's book to show the significance of his theory. It will be noticed that two ideas are found where one has always served in legal technic. According to the prevailing view, ownership itself is only a kind of right or bundle of rights, but according to Puntschart ownership is not a right but a legal bond between a person and a thing. Rights are derivatives of this bond. This necessarily must be so since rights can only inhere in persons and be thought of as availing against other persons. A bond between a person and a thing, whatever else

<sup>57</sup> "Les transformations générales du droit privé depuis le Code Napoléon" (1912), § 4 translated in Continental Legal History Series, XI "Progress of Continental Law in the 19th Century" p. 70.

<sup>58</sup> "Moderne Theorie" p. 74. It is interesting to note that Terry's elaboration of "protected" rights which are juristically similar to the "Rechtsverband" has the merit of priority of statement. It is not probable, however, that Puntschart had any knowledge of the American treatise which was published in 1884.

it may be, is not a right. But what is this bond? We might with a lack of generosity quote the author's words on the nature of a jural relation—that it is “an unknown something.”

**10. Criticism of Puntschart's theory.**—Two observations may be made on this theory.

1. Legal ideas are necessary in any system of law. It is not possible to have an idea of law acting upon social phenomena without a fulcrum of intermediate concepts. The chief way in which legal advantages are distributed is through a system of claims and powers. It is inconceivable that a system of law can exist and function without this intervening mechanical principle. The theory which would strip an automobile of all its parts except the engine and the wheels of the car, is not more unworkable than the theory which would undertake to deliver the force of the law to society without the intervention of a network of connecting ideas called ‘rights.’ Puntschart, unlike Duguit, does not propose this impossible arrangement,<sup>59</sup> but interposes a new mechanical element, the ‘*juris vinculum*,’ as a kind of distributing center through which legal advantages are apportioned among the members of a legal society as the purpose of the law directs. The norm creates the legal bond and from the legal bond are derived such claims and duties as are appropriate. As already suggested, Puntschart is seeking a basis for an internal teleological technic. Where Jhering searched in vain for purpose *of* the law, Puntschart seeks to find a satisfactory base for administering purpose *in* the law.

It may be freely acknowledged that there are serious theoretical difficulties in operating without inconsistency, with the

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<sup>59</sup> The realistic tendency of ‘*freie Rechtsfindung*’ is no doubt also at war with the obstacles presented by a formal technic based on a scheme of rights. There is an organic connection—the product of the age—among a great variety of intellectual phenomena with highly diversified applications—politics, religion, science, art—of which the revolt against authoritarianism in legal categories is only a consistent phase. In this movement even such apparently un congenial attitudes as intuitionism and realism are inherently congruous in their opposition to formalism and reason. Cf. for a view of rights from the standpoint influenced by ‘*libre recherche*’—Pollack “*Perspektive u. Symbol in Philosophie u. Rechtswissenschaft*” (1912) p. 290 sq.

conventional theory of rights.<sup>60</sup> This may be seen in the wide divergence of view on nearly every basic legal idea or institution. It may be that the modern theory of rights needs renovation, but it may be doubted whether its theory can materially be aided by creating a new concept which is to stand as a governing principle. It is not impossible that the idea of 'right,' if not too metaphysical, has at least been too abstract and too absolute. If, perchance, that should be found the source of the theoretical difficulty, the apparent remedy lies in the direction of more analysis and refinement of our fundamental concepts, rather than in the development of an intermediate factor which as stated in terms of purpose, will not fail to substitute new difficulties in multiplied variety, for old ones. Again, it is not clear that purpose in norms may not operate directly upon legal claims in the apportionment of legal advantages.

2. While legal ideas—a system of claims and powers—or, if one prefers to emphasize that side, as we think is historically justifiable not only for Roman law but for any system of law—duties and powers—are necessary, just as for the communication of ideas, some parts of speech at least are necessary, it does not follow that there must be for all systems of law the same set of legal ideas, much less the same methods of combination. To take the language illustration once more, there may or may not be a method of inflection; but whatever the variations in the communication of ideas there will be fundamental similarities which rest on the likenesses of the external world. So is it also with the law. The fact that there are living, contending, and co-operating persons in the external world, makes it necessary to deal with concepts which express these objective realities. It may be opposed that this is another kind of natural law, but the objec-

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<sup>60</sup> These difficulties of theory are especially found where rights are conditional in any essential element or where they are plural in any essential element. For an illustration of a conditional element, we may point to the '*hereditas jacens*.' A fiction is employed here. A plural difficulty may be illustrated by '*jura in re*.' When an easement is created, is the right of ownership diminished, i. e., is the easement carved out of the original right, or is a new right created? Another illustration (discussed by Puntchart in detail *op. cit.*, p. 91 sq.) is suggested by D. 8, 3, 18 with D. 8, 6, 15. Scores of similar questions may be quickly instanced.

tion is beside the point. Since it is admitted that considerable variations may and do exist among the leading systems of law in the methods of distribution of legal advantages, it is not improbable that justice may be administerable according to the plan which the author is at pains to demonstrate the Romans followed, but we incline to believe that the secret of the 'juris vinculum' was not lost until its re-discovery by the author, but rather that the chief difference between Roman law and modern law lies in the greater emphasis in Roman law on the 'actio' as against rights in modern law.

**11. Jural relation is a fundamental concept.**—Situations of fact in the external world are the field upon which the law operates. The great bulk of these facts are entirely outside of the law. They lie beyond the law either because the law is incompetent to deal with them or because, even though competent, it does not choose as a matter of policy to interfere. Of those situations of fact which fall within the scope of the law, the law attempts to govern their future sequences so far as they are under the control of human will. In this lies the essence of legal activity. The law never influences a past state of fact, but always looks to the future. But the law can not deal with these facts in private law directly; it can only influence future causation through the medium of human wills external to itself. The objective situation, if, and when the law attaches, becomes a legal (jural) relation. Since the law does not act directly, it must operate by means of jural relation where there are opposing or opposable human wills which may influence future facts. In private law, therefore, jural relation is a fundamental concept; it is the basic idea through which the whole system of legal advantages is realized.

**12. Classes of definitions of jural relation.**—The definitions of jural relation above discussed,<sup>61</sup> do not submit of unification.

<sup>61</sup> For further discussions and definitions of jural relations reference may be made in gross to the prolific pandects, institutes, commentaries, treatises on general theory of law, and juristic surveys ('Enzyklöpädien') of continental legal literature, and particular reference to the following works not already enumerated in the foregoing discussion: *Puchta* "Cur-

They turn and must turn on the ideas of liberty, power, and claim. The chief differences are found in the number of these ideas which are embraced. In some cases, only certain kinds of one or more of these ideas are included. The differences are not worth classifying in detail. From a general point of view, two classifications are suggested: (a) subjective and objective; (b) monistic and dualistic.

(a) *Subjective and objective theories.* The distinct preponderance lies with the subjective definitions—that is to say, definitions which proceed from a starting point of a system of 'rights.' Puntchart's definition is objective, and while his view is one widely shared, his definition as a formal expression, stands nearly alone. Furthermore, his '*Rechtsverband*' ('juris nexus') can hardly be taken as a substitute for jural relation by reason of its objectivity—it lacks logical connection with the jural relation concept. Since he has given no analysis of rights, the whole classification may be put aside as incongruous.

(b) *Monistic and dualistic theories.* The monistic and dualistic classification, however, may stand, and it is one of considerable importance for juristic theory. This classification also has a realistic and a rationalistic sidelight. From the point of view that law is what comes to pass, the dynamic theory, power alone is of any juristic consequence. Theory may build up a system of claims and powers, just as science may build up its hypotheses of what nature will do under given conditions. But these theories of rights and hypotheses of nature are neither law in one case nor nature in the other—they are only guesses. The monistic view, therefore, disregards every antecedent element of jural causation not expressed in terms of power. There is no such thing as a right of reputation known to the law, or a right of ownership. If one is slandered or a trespass is committed

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sus der Institutionen" p. 50 sq.; Stahl "Rechtsphilosophie" p. 231 sq.; Warnkönig "Juristische Encyclopädie" p. 64 sq.; Dernburg "Pandekten," I, § 41; Regelsberger "Pandekten" I, § 13, 1; Gierke "Deutsches Privatrecht" I, § 28; Neuner "Wesen u. Arten d. Privatrechtsverhältnisse" (1866); Schuppe "Begriff d. subjektiven Rechts" (1887); Müller "Elemente d. Rechtsbildung u. d. Rechts" (1877) § 14; Bekker "System d. heut. Pandektenrechts" (1886-1889) I, 46 sq.



on land, there is still no right or claim to be compensated, known to the law. It is merely an hypothesis that there are such sanctionable (primary) and sanctioning (remedial) rights, because it seems irrational that the law would take any notice of a claim to state interference unless the law also meant to say that such rights existed before infringement—post hoc, propter hoc. The answer which may be made is that historically the law everywhere begins as a system of procedure, and that even when it seems to recognize the antecedent elements of jural causation, it does so unofficially—that, in the last analysis, it is what the law does that counts, and not what the officers of the state, in the administration of justice or in the making of legislation, promise or threaten. Not even a complete legislative statement of sanctionable rights, in this view, would alter the matter, since, in the last analysis, all that had been declared could conceivably be disregarded, and, in actual practice, would be disregarded in part. Everything, in short, which attempts to predict what form state interference will take measured in terms of claims or powers may belong to the logic of probabilities, but it can not be real. Its reality is not even created by future demonstration of the correctness of the probability, since reality can only be measured by reality.<sup>62</sup> Such, in a general way, would be the interpretation of jural relation from the point of view of realistic monism.

The other variety, rationalistic monism, would put all the emphasis on rights or on certain kinds of rights. This is objectionable on two grounds: (a) it divorces procedural 'rights' (powers), stopping short at the point where sanctionable rights may be realized; and (b) it does not include (at least not by name or description) the important group of non-procedural powers. It is more difficult to justify this narrow application of jural relation to situations of correlated rights and duties than the realistic monism which confines the term to the power to proceed in a court of law or by self-help.

The dualistic view—dualistic in two senses: (a) in including both claims and powers, and (b) in including both substantive

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<sup>62</sup> Cf. Prof. *Joseph H. Bingham* "What is the Law?" *Mich. Law Rev.*, (1912) 11: 1, 109.

and procedural claims—is the one we prefer to adopt. The reason may briefly be stated. The rational (hypothetical) and actual (existential) phases of legal science should be harmonized. They are harmonized in actual life both in theory and practice. Other sciences, especially sociology and ethics, may and do separate them, but legal science would be sterile if one were systematically detached from the other. It is also of the greatest practical advantage that the union be maintained since the two fields are mutually corrective. Theory, on one hand, may influence the facts of justice, and legal justice is constantly opening up new fields of research for theory.



## CHAPTER IV

### ELEMENTS OF JURAL RELATIONSHIP

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| 1. Examples of jural relationship.<br>2. Four possible attitudes of the law toward situations of fact.<br>3. Two legal persons. | 4. Complex relations.<br>5. What is a legal person?<br>6. Jural relations involve acts only.<br>7. Coerciveness of rules.<br>8. Coerciveness of legal relations. |
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1. **Examples of jural relationship.**—Before undertaking to state the elements of a jural relation, it will be desirable to set down examples of various kinds of jural relations. The examples are as follows:<sup>1</sup>

(1) *Nexal claim and nexal duty*: *S* (*servus*) owes *D* (*dominus*) an enforceable duty to tender to *D* a sum of money.

The graph of this relation is      $[ \overset{+}{\leftarrow} ]$

(2) *Nexal immunity and nexal disability*: *D*, a legislative officer, while in the discharge of his duties may not lawfully be arrested by *S*, an executive officer of the courts.

The graph is      $[ ] \overset{+}{\leftarrow}$

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<sup>1</sup> At the risk of repetition, it will be helpful to state the meaning of some of the terms and symbols which are used here.

The term 'nexal' is applied to the specific varieties of 'zygnomic' relations; in like manner, the term 'simple' is applied to the specific varieties of 'mesonomic' relations.

Arrows in the symbols are used to indicate *acts* (meaning by act a legal result as distinguished from muscular movements or 'acting'). Plus and minus arrows indicate, respectively, positive and negative acts.

The arrows when inclosed in brackets indicate legal relations; i. e., the act is *involved* in the relation. Square brackets are used for zygnomic relations; round (parentheses) brackets are used for mesonomic relations.

Square brackets immediately preceding arrows (and always, if used, at the left) indicate that the dominus of the given relation can obstruct the arrow (act) in its projected movement. Thus, in No. 2 (text above), the legislative officer obstructs the act of the arrest with the support of the law.

(3) *Nexal privilege*<sup>2</sup> and *nexal inability*: *D*, for the purpose of preventing a substantial and dangerous conflagration, may destroy the goods of *S*.

The graph is  $[ \overset{-}{\longrightarrow} ]$

(4) *Nexal power* and *nexal liability*: *D*, a landowner, may eject *S*, a trespasser.

The graph is  $[ \overset{+}{\longrightarrow} ]$

(5) *Simple claim* and *simple duty*: *S* has verbally agreed with *D* to convey land.

The graph is  $( \overset{+}{\longleftarrow} )$

(6) *Simple immunity* and *simple disability*: If *D* gives to *S* a license, revocable at will, to enter *D*'s land, *D* has a simple immunity against *S*'s entering and *S* is under a simple disability to enter. While the license exists, i. e., before it is revoked, *D* can not prevent *S*'s entering; there is no violation of duty if *S* enters. The explanation of *S*'s disability to enter, though he is under no present duty not to enter, lies in the fact that *S*

It should particularly be observed that these symbols are graphed in such a way that the dominus of the relation is *always* at the *left* of the symbol — (the arrow [act] proceeds to or from him); and that the servus of the relation is *always* at the *right* of the symbol — (the arrow [act] proceeds to or from him).

The precise distinctions between zygnomic and mesonomic relations must be reserved for a separate, detailed explanation.

<sup>2</sup> The graph of 'privilege' is one that gives difficulty and at this point also a brief explanation will be useful. The graph presented is of the recession of a negative act. The negative act in question in words is: "Not to destroy the goods of *S*." The effect of the recessive bracket is to nullify the negation. In words, the relation reads (with the recessive bracket): "Not *not* to destroy the goods of *S*." This means that *D* is in such legal position as against *S* that *D* may destroy the goods of *S*, but that meaning, which is a logical inference, needs to be shown by another form of graph as follows:  $D [ \overset{+}{\longrightarrow} ] S$ . The latter graph, of course, is much simpler to understand since it is a direct representation of *D*'s legal position in positive form.

The difficulty of the privilege graph, it may be mentioned, is not one intruded capiously by juristic science, but results from the usages of professional speech which in this instance combines the recessive nature of 'privilege' with the processive nature of 'power' in one expression—"the *privilege* of *D* to *destroy* the goods of *S*." The linguistic convenience of this locution lies in that it emphasizes the exceptional character of *D*'s power. It is not an ordinary power that permits the lawful destruction of another's goods. But the convenience of the expression which states two facts at one stroke produces an unavoidable complication if the case is to be accurately stated or accurately understood.



has a simple privilege to enter. *S* has more than a mere liberty to enter, since there is a legal relation between *S* and *D*, but *S* is not in such a legal position that he can constrain *D* against his legal position (we do not say *D*'s will, since that is irrelevant) because, at the same moment, *S*'s privilege to enter is in integral conflict with *D*'s power to revoke *S*'s license.

This complex jural situation arises from the fact that mesonomic relations may be in logical conflict for the reason that the law gives no assistance to the dominus of a mesonomic relation.

It may be noted here in further explanation of this difficult problem that the law may act with reference to a given situation in one of four ways:

**2. Four possible attitudes of the law toward situations of fact.**—(1) It may lend its support by giving a sanction to the dominus of a relation that is invaded. If a debtor fails to pay his debt, the law gives the creditor a remedy for the debtor's breach of duty.

(2) The law may disapprove the evolution of a relation. If the debtor had the power to commit a breach of his duty toward his creditor, this power to extinguish the legal relation of which the creditor was dominus, must itself be a legal relation since it has legal consequences; but the evolution of this relation is one that the law disapproves.

(3) The law may approve the evolution of a legal relation by creating new duties which have the purpose of giving legal effect to the relation evolved. Thus, if an agency is terminated, the agent comes under a new duty to cease to act as agent whatever may be the legal situation with reference to third persons. Or, again, if a tenancy is forfeited, the tenant comes under new duties not to interfere with the land.

(4) The law may neither approve nor disapprove the evolution of a relation. Thus, a vendor's failure to convey land to the vendee in an oral agreement is a negative evolution which the law neither approves nor disapproves.

In the problem under consideration, the law neither approves nor disapproves the evolution of the mesonomic relations, i. e.,

the disability relation or the privilege relation. They may, therefore, be in logical conflict.

The graph of this relation is  $(1 \xleftarrow{+})$

(7) *Simple privilege and simple inability*: In the example last put (No. 6) *S* and *D* change places and *S* becomes *D* and *D* becomes *S*, i. e., dominus and servus, respectively. The licensee has a simple privilege to enter and the landowner is under a simple inability to prevent the licensee's entering, although the landowner has a concurrent nexal power to destroy the licensee's privilege.

The graph is  $(1 \xrightarrow{-})$

(8) *Simple power and simple liability*: *D* has a simple power to make an offer to *S* of *D*'s promise for *S*'s act. Here, again, the law neither approves nor disapproves *D*'s act of offer.

The graph is  $(\xrightarrow{+})$

We find on examination of the above typical examples that they contain the following common elements: (1) Two legal persons; (2) an act; (3) some form of constraint by one person over the other.

3. **Two legal persons.**—A jural relation must have one dominus and one servus.<sup>3</sup> If there is no dominus there can be no servus. Contrariwise, if there is no servus there can be no dominus.

It was supposed by Jhering that there could be a temporary condition where a legal relation could exist having a servus but not having for the time being a dominus. This view is wholly

<sup>3</sup> "A relation is incomprehensible without two terms. It is impossible to have the intuition (a priori synthetic judgment) of a relation without having at the same time the intuition of its two terms, and without remarking that they are two, since for a relation to be conceivable, they must be two and two only": Poincaré "Science and Method" (Maitland's tr. n. d.) p. 164.

"The term legal relation should always be used with reference to two persons, neither more nor less": Arthur L. Corbin "Legal Analysis" Yale Law Journal, 29:164-5.

untenable since the idea of relationship of any kind implies of necessity two elements, one of which in some manner either materially or ideally is connected with the other. If either the connecting fact or one of the elements disappears, the relation ceases to exist. There are, however, legal situations which suggest such a theory. In addition to the examples given by Jhering, we may instance the situation of legal relations concerning chattels in the interval between the death of the owner and the appointment of an administrator. Suppose, in that interval, *B* converts one of the chattels. Has *B* committed a tort, and if so, against whom? There are various ways of dealing with such a problem, as follows:

(1) We may say that there was a duty but no claim; that the claim was in suspense, and that on the appointment of an administrator, the claim comes into existence by relation back to the tort. This explanation requires two fictions: (a) A temporary one-sided relation; and (b) the fiction of relation back.

(2) We may suppose that legal title in the chattels of the decedent is created in (or, less accurately, transferred to) some person or class of persons awaiting the appointment of an administrator (e. g., to the heirs, the state, or the probate court, etc.) in passive trust or otherwise. This explanation avoids the fictions and it is reasonable, but logically carried out can be very cumbersome in application.

(3) We may also suppose that the persona of the decedent survives long enough to carry the title forward with all the incidents of new or changed legal relations until an administrator accepts his appointment. This explanation, we believe, is the simplest one for the case put, and it is comparable to the 'hereditas jacens' of Roman law.

**4. Complex relations.**—While logically it is impossible to accept the idea of a one-sided relation, whether in law or in physics, yet may there not be more than one dominus or more than one servus in a single jural relation? If two men jointly owe a debt, are there not two servi and one dominus? The

necessary answer, and it admits not of the slightest doubt, is that jural relations, like the relations of logic, are strictly duadic. There is a single 'referent' and a single 'relate'. There can not be more or less in a single relation of any sort whatsoever. The instances of debts jointly owned or jointly owing are not unitary relations but complex (plurinary) jural relations. They are not reduced to their lowest terms.

If a debt of \$100 is owed by a single debtor to two joint creditors, there are two principal jural relations.<sup>4</sup> The debtor (*S*) owes \$100 to creditor *A* and \$100 to creditor *B*. But if he pays one of these debts, the other is discharged. They are dependent relations. Juristically the situation is analogous to the case of alternative performances.<sup>5</sup> The existence of each is

<sup>4</sup> There is still another possible, and perhaps preferable, explanation—to regard joint creditors, joint debtors, joint tenants, and other similar complexes of rights and ligations as constituting distinct personæ. This view gives a new extension to the idea of jural personateness. If *A* and *B* are joint creditors of *S*, the graph showing the personification of *A* and *B* into a new jural entity would be—

$$\left\{ \begin{array}{c} A \\ B \end{array} \right\} D \left[ \begin{array}{c} + \\ \leftarrow \end{array} \right] S \quad \text{or} \quad \left\{ \begin{array}{c} A \\ B \end{array} \right\} \left[ \begin{array}{c} \leftarrow \\ \leftarrow \end{array} \right] S$$

If *A* and *B* are joint debtors of *D*, the graph would be—

$$D \left[ \begin{array}{c} + \\ \leftarrow \end{array} \right] \left\{ \begin{array}{c} A \\ B \end{array} \right\} \quad \text{or} \quad D \left[ \begin{array}{c} + \\ \leftarrow \end{array} \right] S \left\{ \begin{array}{c} A \\ B \end{array} \right\}$$

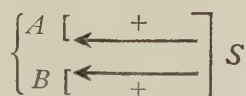
<sup>5</sup> In the case of alternative performances where the servus (*S*) has the power to elect one of two alternative performances owing to one creditor (*D*), the graph of the debt relation is—

$$\left\{ \begin{array}{c} D \\ D \end{array} \right\} \left[ \begin{array}{c} + \\ \leftarrow \end{array} \right] S$$

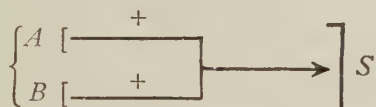
If the same creditor can elect one of two alternative performances against the same debtor, the graph of the power relation is—

$$\left\{ \begin{array}{c} D \\ D \end{array} \right\} \left( \begin{array}{c} + \\ \leftarrow \end{array} \right) S$$

dependent on the existence of the other, and the evolution (payment) of one resolves the other. The jural situation may be graphed as follows:



Assuming now that there has been a default by *S* and that both creditors must join in an action to recover damages from *S*, we find another complex which in similar manner is reducible to two unitary (atomic) jural relations. The jural situation may be graphed as follows:



In certain situations, such as those shown, it is convenient to consider complex legal relations as units, but when occasion arises for accurate analysis of these relations it is necessary to state them in their ultimate forms.

**5. What is a legal person?**—Except in the case of so-called artificial legal persons, it is the common belief that human beings and legal persons are precisely the same. This belief is demonstrably untrue.

A human being is never directly the dominus or servus of a legal relation. Legal relations, in strictness, therefore, never exist between human beings. To assume that one human being is or can be in legal relation to another is a mere figure of speech. Legal persons (personæ) in a scientific sense are conceptual points of reference by which the law makes a convenient adjustment of human interests. These conceptual legal persons may, and do for certain technical legal purposes, antedate and postdate the life of human beings.

The legal personateness with a substrate consisting of a human being, living, dead, or unborn, is in no respect different from the legal personateness with a substrate consisting of a plurality of human beings (corporation aggregate) or of a succession of



human beings (corporation sole). There are different kinds of legal persons, differing in their capacities, but there is only one kind of legal personateness. It is inelegant and unnecessary to suppose that legal personateness can be of two or more different varieties. All the needs that are suggested by that view are fully conserved by admitting different kinds of legal persons with different capacities for legal relations.

In the Anglo-American system of law, legal personateness generally has for its substrate a human being or a group or succession of human beings, and exceptionally an anticipated human being or a retrospective human being. In Roman law systems, complexes of objects and legal relations are sometimes legally personified. In our law, material things are sometimes personified (e. g., ships in admiralty, impure foods and drugs, goods subject to forfeiture under revenue laws, etc.).

Since jural relations can only exist between conceptual personæ, it follows that a jural relation can not exist between objects, human being and an object, nor can an animal be a party to a jural relation.

**6. Jural relations involve only acts.**—The field of the law is regulation of human conduct and only human conduct. The social and historical fact back of the legal establishment is that political societies restrict their membership to human beings and attempt by rules of law to regulate the conduct of these members as between themselves and with respect to the objects and forces of the outer world.

**Regulation of human conduct** necessarily excludes all that is not human conduct. But while the field of law is human conduct, the law actually looks only to the effect of conduct and if the right effect is produced, is satisfied no matter what the conduct (course of acting) has been.

This may be shown by numerous examples. *B* owes a duty to restore to *A* a horse unlawfully taken out of *A*'s possession. The horse escapes from *B* and returns to his owner. *B*'s duty to restore the horse is discharged. The constraint to restore the horse was upon *B*. That constraint required of *B* an act (i. e., a factual result). That factual result was accomplished and

accordingly *B*'s duty is extinguished. While the duty here was discharged it was not performed. If the horse while in *B*'s possession had been killed by lightning, the same duty would have been discharged though not performed. While the duty existed it required of *B* a course of human acting that would lead to a certain factual result (the act).

Another instance may be worth considering. Suppose *B* owes *A* a sum of money and *C*, *B*'s agent, acting within the apparent scope of his authority but without actual authority (and it may here be assumed contrary to his principal's directions) pays the money to *A* out of *B*'s funds. Assuming that the debt is discharged, was the payment a performance? Is there any juristic difference in the discharge of a duty where a horse returns to his owner and where an agent without authority pays the principal's creditor? We believe there is. In the horse case, the duty is discharged by an event. In the agent case, the duty is discharged by an act. In the horse case, there is a discharge of legal duty without performance of the duty. If the tortfeasor had turned the horse loose knowing that the horse probably would return to the owner's stable, then the act would have been performance. In the agent case, the payment by the agent is payment on behalf of the principal.

These instances are put to show that while legal relations may be terminated by events, yet performance of legal duties or the exercise of legal powers can only be accomplished by means of positive or negative acts. It is also to be observed that while a duty may be positive in form it is possible to perform by negative act, although, in the end, the act must be a positive act as to the proximate actor. In the agent illustration, the act (payment) is the positive act of the agent, but since the agent lacked authority it was the negative act of the principal.

**7. Coerciveness of rules.**—Legal rules are coercive. All rules in every department whether of art or science or human conduct have a coercive quality. A rule is descriptive of what will certainly happen, of what probably will happen, of what must be done or avoided, or of what should be done or avoided. While the idea of 'rule' or 'law' may imply oughtness or prob-

ability, there can be no lack of certainty in the rule either in its formulation or in its application. It must be coercive in the strict sense. If there is any lack of clearness in what is required or any uncertainty in the factual operation of the rule, then the rule, if there is one, has been defectively stated. But since the attainment of this rigorous certainty is very largely unattained and most largely unattained in those fields of knowledge which deal with numerous complex elements, as, for example, in the social sciences, rules or laws for social phenomena have at the best a hypothetical character. In closed systems of thought, as in logic and mathematics, on the contrary, these rules may have apodictic certainty. But while rules may have a hypothetical character, yet they are also practically treated as embodying that certainty which they lack and toward which they tend in the development of scientific truth.

The law partakes in part of the uncertainties of the social sciences in general. Formulations of law, therefore, are hypothetical, but the applications of law are coercive applications. Law is never applied by the state in any other way than by coercion, and we mean here by coercion simply the phenomenon of application itself. The legal phenomenon is coercive simply because it is legal phenomenon. The hypothetical rule may be and often is contradicted by the phenomenon, but the rule was intended to be an expression of what must certainly happen just as the contradicting phenomenon expresses what certainly has happened. It is this element of what is expected or what actually occurs that embodies the coerciveness of legal rules. Take that away from the idea of legal rule or any rule whatsoever and the rule vanishes.

But while the law is a living social science it has in it another element that tends toward greater certainty in the statement of legal rules and greater certainty in their factual application. This is the logical element in law. It is the servant of the living organism but without it the organism could not live or grow. The law, therefore, is a fluid system which seeks constantly to become rigid. As Pound has aptly stated it, "law must be stable and yet it can not stand still."

**8. Coerciveness of legal relations.**—There is no legal relation that is not created by law, either directly or indirectly. In general, the rule of law creates the hypothetical conditions under which legal relations come into existence. Thus, the rule provides that if certain forms of bargaining are carried out, the promises made will be enforced. The law provides that if certain acts are done, certain officers of the state may initiate proceedings before the criminal courts. In all these cases, the rule of law is an abstract formulation of a contingency which conceivably, though not practically, might never arise. The formula for this interconnection of legal rules and legal relations has been expressed by Jhering as: "If (hypothesis)\* \* \*; then (disposition)\* \* \*"; that is to say, if a certain state of facts exists, then such or such a rule shall apply.

Legal relations also are coercive. The coercion implicated in abstract form in legal rules gives to legal relations their practical jural validity. A rule that could be ignored at will would not be a rule. So also a relation that did not in some form either directly or consequentially involve physical constraint authorized or applied by the state would not be a legal relation.

There are two chief kinds of legal relations which are distinguished among themselves by the manner in which legal constraint is applied to them. One of these is the mesonomic relation in which the legal constraint is contingent and consequential; the other is the zygnomic relation in which legal constraint is direct and immediate. These two kinds of legal relations are practically illustrated by the examples given above.





## CHAPTER V

### TEST OF JURAL RELATIONSHIP

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|--------------------------------|---|
| 1. Relation in general.        | 6. Importance of mesonomic relations.       |
| 2. Jural relation.             | 7. Juristic quality of mesonomic relations. |
| 3. Problems of jural relation. | 8. Summary and conclusions.                 |
| 4. Test of jural relationship. | 9. Definitions.                             |
| 5. Mesonomic relations.        |   |

1. **Relation in general.**—In a wide sense, a relation is any fact shared by two things.<sup>1</sup> If  $x$  is red and  $y$  is blue,  $x$  and  $y$  share the common fact of possessing color. In a narrow sense, a relation means an interconnection between two things without a third point of reference. If  $x$ , by its independent force, impinges on  $y$ , the relation does not have a third point of reference.

Relations may be classified in a great variety of ways. Things may be related in time, as of earlier and later time, as of the same time, or of overlapping time. They may be related in space in a similar way. They may be related according to vector magnitude, position in a series, order or arrangement, genetically, causally, and in various other ways.

2. **Jural relation.**—Our first problem is to discover what are the specific qualities which determine that a given relation is a legal relation. The problem presents many incidental questions that must be answered. Does a legal relation implicate constraint? If constraint is implicated, must this constraint be a present constraint? Again, if constraint is necessary to a legal relation, what is the form of that constraint?

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<sup>1</sup> "A relation \* \* \* may be regarded as a class of couples ( $x, y$ ), for which some function  $T(x, y)$  is true": *Whitehead and Russell* "Principia Mathematica" (Cambridge 1910) Vol. I, 211. The uses of different sorts of relations (W. and R.) are: 1, To give rise to descriptive functions; 2, correlations between different classes; 3, to generate series.

Since law is a state emanation which operates coercively to regulate the conduct (within limits) of the members of human societies; since legal rules require conformity under pain of physical pressure; and since legal relations are cast in the molds of legal rules, it is an easy predisposition to expect that legal relations in their objective manifestation have the quality inherent in them of physical force that may be applied or invoked by one person against another. Some of the more obvious instances that come to mind support this rigorous view. If *S* owes *D* money, *S* is required to act in favor of *D*. If *S* does not act as required, *D* may invoke the aid of the state and eventually may invade the estate of *S*. Again, if *S* is a trespasser on the land of *D*, *D* may use reasonable means to remove *S* from the land.

Both these instances, clearly enough, are examples of legal relations. The first is a duty relation and the second is a power relation. The first example (the debt) requires *S* to act under threat of an eventual disadvantage. Constraint here takes the form of compulsion requiring the servus of the relation to act physically in a prescribed manner. In the second instance, the constraint takes the form of physical aggression against the trespasser.

These two cases, while unlike in the application of physical pressure, have the common factor that the physical ambit of the servus of the relation is restricted. If this generalization will be found applicable to other instances of admitted legal relations, the problem advanced, so far as concerns the element of constraint, is easily solved.

**3. Problems of jural relation.**—Out of an abundance of available examples, we may select for consideration three that are fairly typical.

(1) *D* has a power to commit a battery against *S*.

(2) *D* has a power to make an offer of contract to *S*.

(3) *S* owes *D* a sum of money, but the statute of limitations has run on *D*'s power to sue effectively.

Are these also instances of legal relations? If any of them

are to be so considered, do they square with the generalization above put?

(1) When we say that *D* has a power to commit a battery against *S*, we do not mean physical power alone; the physical factor for the present purpose is irrelevant. *D* owes *S* a duty not to commit a battery. Since *D* owes that duty, necessarily the law must afford *D* the means to perform. 'Lex neminem cogit ad vana.' Likewise, it is a necessary inference that if *D* has the power to perform his duty, he must also have the power to violate it, since the law does not act upon automata but upon beings having at least an apparent freedom of choice. The power to perform the duty is necessarily accompanied by the power to violate it.

It must not be overlooked that we are not concerned here with *D*'s duty to *S*. That duty clearly requires a restriction of *D*'s range of physical movement. We are interested primarily in *D*'s power to violate his duty to *S*, and secondarily in *D*'s power to perform his duty to *S*. Are these latter instances legal relations?

If *D* has the power to violate his duty, then *D* has the power to restrict the natural range of physical movement of *S*. But if *D* has the power to perform his duty to *S*, then the exercise of the power does not operate to cut down the natural range of physical movement of *S*. Must we say then that the power to violate a duty is a legal relation while the power to perform is not a legal relation? Such a solution would seem to be anomalous. There is, however, another escape. We may say that neither of these instances exhibits a legal relation, or we may say that both cases are instances of legal relations.

If we accept the first alternative, that neither instance is that of a legal relation, the generalization of physical constraint will stand unimpaired. If we accept the second alternative, the generalization falls and compels a reconstruction of the idea under discussion. Before proceeding to what we believe is the proper solution, we shall first consider the remaining typical instances.

(2) If *D* has a power to make an offer of contract to *S*,

there are several possibilities, and in order to present our point in a crucial aspect, we will assume that *D* has the power to offer his promise for the act of *S*. There is no doubt that *D* may make such an offer. Is that power a legal relation? Let it be observed that we are considering only the power, not the exercise of it, and much less the steps that might follow the making of such offer. It is not even necessary to assume that *D* and *S* are acquaintances or that either has ever heard of the existence of the other. Put in this way, the existence of a legal relation must appear to be a highly diaphanous and unreal thing, but perhaps the affirmation of legal relations for such cases can not be avoided.

If *D* has a power to make an offer that may end in his obligation to carry out a promise and where *S* is at no time obligated to do anything, there is clearly no semblance of a physical constraint upon *S*. If this instance is to be put down as a legal relation, then, again, the constraint generalization falls, since there is no physical constraint upon the servus of the relation (the offeree). Furthermore, if the offer is accepted by the performance of the act on the part of *S*, the result will be a physical constraint upon *D* to carry out his promise.

(3) If *S* is indebted to *D*, *D* is powerless after the bar of the statute of limitations to constrain *S* to pay. *D* has a power of suit, but in considering the quality of a legal relation it is necessary to measure the existing forces on both sides of the relation. *D*'s power to sue may be effectually neutralized by *S*'s power to set up the bar of the statute. Clearly, there is no constraint upon *S* to pay the debt. That *S* still owes the debt despite the statute is legally demonstrable, but is there a legal relation with respect to the debt?

**4. Test of jural relationship.**—The above typical examples bring us to the conclusion that if they are to be denominated legal relations, then the criterion of physical constraint operating directly on the servus of the relation by the evolution of the relation is **faulty**.

Again, if relations of the latter type are jural relations, it is

apparent that there are at least two important kinds of jural relations; one in which direct physical constraint of the servus of the relations is indicated with the support of the law; the other where no such physical constraint upon the servus of the relations appears.

Our difficulty is not with the first type of relation, which implicates physical constraint of the servus with the support of the law—these qualities harmonize with the nature of law and the character of legal rules. Since there are no terms in professional use to characterize jural relations, we have applied to this class of jural relations the term ‘zygnomic.’

The other class of relations presents a real difficulty in two ways: (a) To justify their inclusion among jural relations; and (b) to state the universal qualities of such relations. Assuming, as we do, that the difficulty is surmountable, we shall distinguish these relations from ‘zygnomic’ relations by the term ‘mesonomic.’

In the three typical examples above discussed, we find that while direct physical constraint is lacking and that while the approval of the state may be wanting for their evolution, yet in each case the evolution of the relation has a specific jural effect; it brings about a result of which the law will take notice.

If *D* commits a battery on *S*, the legal effect is to create a zygnomic relation in which the tortfeasor lies under a duty to render compensation for his harm.

If *D* makes an offer of his promise for the act of *S*, the legal effect is to create in the offeree a power to accept the offer. Here, also, it will be noticed, there is not a physical constraint implicated in the relation newly created. The offeree simply has a power to accept. That power does not immediately constrain the offerer, but the acceptance of the offer will immediately and directly create a zygnomic relation in which the offerer is physically constrained with the support of the law to fulfill his promise.

It is apparent that there is a qualitative juristic distinction between the power to make an offer and the power to accept an offer. They are both mesonomic relations, but the latter relation (the power to accept) has a more forceful and a closer connection with the eventual constraint of the resulting (after evolution of the power to accept) zygnomic relation. While per-



haps there is no important need of designating the distinction, we may, if such need appears, call those relations that upon evolution result directly with the approval of the law in zygnomic relations, 'prozygnomic' relations.

It is also to be remarked of the example last discussed that the evolution of one mesonomic relation results in the creation of another. The power to offer when evolved (i. e., when the offer is made) gives the offeree, before revocation a power to accept the offer.

If *S*, the debtor of a debt barred by limitation, pays his debt to *D*, there is likewise a legal effect. What that legal effect is, is somewhat doubtful. It is generally supposed when a debt is paid that the legal effect is to extinguish the legal relation represented by the debt. It is perhaps not demonstrable that just that effect is accomplished. It is, however, demonstrable that the creditor after payment no longer can maintain an action for the debt whether the defense of payment is pleaded or not, so long as the fact appears. Without predicating the convenient juristic hypothesis that the debt relation has been destroyed, we may say that the legal effect of payment is to cast a duty on the creditor not to demand a second payment. So much, at least, is legally demonstrable.

**5. Mesonomic relations.**—It still remains to justify the attribution of legal relationship to the kinds of relations discussed as mesonomic relations. We have seen that the evolution of a mesonomic relation may create either another mesonomic relation or that it may create a zygnomic relation. In every case of evolution of a mesonomic relation there is a legal effect (a legal situation upon which the law will act).

That these situations are those involving relationship, of course, is not in question. The question is whether these relations are anomic, as when two human beings are in spatial relationship (of which the law ordinarily takes no account), or whether they are nomic relations. Without pressing here the metaphysical point that effect and cause are the same fact, we believe, from a practical point of view, it is decisive of our question that a legal effect can only be produced by a legal cause. If the effect

is a legal effect, the cause is a legal cause. The fact of relationship being already admitted, the rest follows.

Certainly there is no theoretical difficulty in this view, and it is of great practical value to accept it. In fact, the sequences of legal phenomena could not be understood without bringing these relations into the field of legal relations. The difficulty of supposing that a tortfeasor before committing his tort was in legal relationship to the person harmed, with the unlawful act as the involved content of the relation is a difficulty of the market place and not of legal science.

There is, however, a theoretical difficulty that might possibly be urged, but it is one easily dispatched. Events of nature such as fires, earthquakes, birth, deaths, and the running of time, produce legal effects. Must we, to have a complete logical structure of juristic ideas, say that these legal effects were produced by legal causes and by legal relations?

If we admit this, we must admit legal relations between the forces of nature and man. That admission is impossible, but we may and must admit that the events of nature are legal events since they produce legal effects. But there are no relationships of a legal nature except among men functioning in legal science behind the masks of personæ. Law is an organized regimen of human conduct and it lays no commands on nature or on beings higher or lower than man. Accordingly, it recognizes no legal relationships beyond human society.

**6. Importance of mesonomic relations.**—Compared with zygnotomic relations, mesonomic relations are inferior in legal potency. A zygnotomic relation directly constrains the servus of the relation with the support of the law, but a mesonomic relation either does not constrain the servus directly or lacks the support of the law. Yet, in technical legal analysis, mesonomic relations in modern law and theory completely overshadow zygnotomic relations. Ordinarily, when the stage of a zygnotomic relation is reached, unless there are conflicting mesonomic relations to be considered, legal analysis has come to an end. The most difficult and important problems of the law deal with mesonomic relations. Mesonomic relations not only predominate in technical

significance but they also often serve the purpose, when taken into account in difficult analysis, of clarifying the legal problems under consideration. Since, in general, a legal situation is more complex in its interplay of jural relations than is commonly supposed, it is often necessary to resort to symbols to show the chain of legal reasoning.

There is a temptation to speak of mesonomic relations as 'imperfect' legal relations, but there are sufficient reasons why the term is inapplicable. The idea of 'imperfection' suggests perfectibility. There are instances where a zygnomic relation suffers a reduction or alteration in legal quality and becomes a mesonomic relation. A debt barred by limitation is such an instance. The debt is the same debt, but the liability of the relation has ceased. It is like an electric battery which has become discharged and which may be renewed. There are also mesonomic relations that may be transformed into zygnomic relations. Thus, an infant's executory promise is unenforceable, but the infant, upon attaining his majority, may affirm his obligation and make it perfectly enforceable.

These instances exhibit the idea of perfectibility and imperfectibility, and if all mesonomic relations submitted to the same process, the term 'imperfect' would be a convenient substitute for 'mesonomic.' The fact, however, is otherwise. The great bulk of mesonomic relations are unalterable in legal quality and do not submit of being made more 'perfect.' The power to commit a tort, the power to make an offer, claims against the sovereign, claims of one sovereign against another, are mesonomic relations that never can change in legal quality. Mesonomic relations without exception are perfect relations, and no distinction between zygnomic and mesonomic relations based on the greater completeness of one relation as against the other can be supported. The real distinction lies in another direction, and is based on the proximity of the dominus of the relation to the exertion of physical constraint.

Again, the test of 'perfection' is highly indefinite. No legal relation is or can be perfect in the sense of absolute security in actual realization of an economic advantage. Duties in general may be actually broken and even in the somewhat exceptional

cases of infrangible duties (duties that can not be destroyed except by performance) the realization of the economic advantage of the duty will depend on other facts, legal and economic, of a contingent nature.

**7. Juristic quality of mesonomic relations.**—We found that the earlier provisional generalization of physical constraint implicated in the evolution of legal relations was strictly applicable only to zygnomic relations, and we must be alert now to see that we are not misled in another way by generalizing mesonomic relations as those whose evolutions have legal effect. The generalization appears to be correct, but it needs to be made more definite. What is a legal effect? The creation, destruction, or alteration of legal relations are legal effects, but we are seeking to find the precise ultimate nature of a legal relation. We are therefore here in danger of traveling in an infinite circle.

It will be useful at this point to enumerate some of the effects of the evolution of mesonomic relations as a groundwork for a generalization of their juristic quality. The evolution of a mesonomic relation may have the following legal effects:

(1) It may create a prozygnomic relation with another dominus. Thus, an offer of gift creates a power to accept the gift, the evolution of which restricts the then physical freedom of the donor of the gift.

(2) It may create a zygnomic relation with the same dominus. The acceptance of an offer of gift illustrates the point.

(3) It may create a zygnomic relation in another dominus. Commission of a tort illustrates the point.

(4) It may create a prozygnomic relation whose evolution creates two independent zygnomic relations with different domini. An example of this situation is an offer by *A* to *B* of a promise for a promise. The acceptance of the offer directly creates two zygnomic relations (assuming that the promises are independent, or two mesonomic relations if the promises are dependent). The first alternative may be graphed as follows:

$$A \left( \overset{(1)}{\underset{+}{\rightarrow}} \right) B \vee A \overset{(2)}{\underset{+}{\rightarrow}} B < B \left( \overset{(3)}{\underset{+}{\rightarrow}} \right) A \vee B \overset{(4)}{\underset{+}{\rightarrow}} A < \begin{cases} A \left[ \overset{(5)}{\underset{+}{\leftarrow}} \right] B \\ B \left[ \underset{+}{\leftarrow} \right] A \end{cases}$$

[*Explanation:* (1) is the power of  $A$  to make an offer to  $B$ ; (2) is the evolution of the preceding relation; (3) is the result of the preceding evolution—power of  $B$  to accept  $A$ 's offer; (4) is the evolution of the next preceding relation; (5) is a complex of two independent relations of  $B$  and  $A$ , respectively as dominus. Round brackets indicate mesonomic relations and square brackets indicate zygnomic relations. The sign  $\vee$  means evolution; the sign  $<$  is equivalent to 'resulting in.' Unbracketed arrows are evolved relations or jural facts.]

Some of the facts that may be gathered from, or which are suggested by, this brief survey concerning the juristic nature of a mesonomic relation are the following:

(1) The servus is constrained to suffer a certain change in his legal situation by the evolution of a mesonomic relation. He may become the dominus or servus of the new relation.

(2) The evolution of a mesonomic relation may create another mesonomic relation or it may create a zygnomic relation.

(3) Not more than two mesonomic relations in a causal chain precede the creation of a zygnomic relation except where a binary complex of two dependent mesonomic relations is created.

(4) A mesonomic relation does not work a direct constraint on the physical freedom of the servus with the support of the law, but when evolved it will, either directly or through the intermediation of a sequential mesonomic relation which is evolved, work an assisted restriction of the physical freedom of either the dominus or servus of the given mesonomic relation.

(5) The evolution of a mesonomic relation may result in the destruction of a zygnomic relation without the sequence of a new relation (e. g., consumption of a chattel).

**8. Summary and conclusions.**—Since the function of law and legal rules is to regulate human conduct, legal relations operate to control the conduct of one person in favor of another.



There are three methods in such regulation of conduct that are employed in the distribution of legal relations:

(1) The first method is that of the control of the natural physical freedom of movement of one person in favor of another. If a man owes a duty, his natural freedom is cut down in one of two ways: He may owe a duty to perform an act for another, or he may owe a duty to refrain from an act in favor of another. In both cases his freedom is cut down; in one instance, because of what he must do; in the other instance, by what he is unable to do.

Natural freedom may also be abridged by a power that the dominus of a legal relation may bring to bear on the servus as where a police officer makes a lawful arrest.

(2) The second method is where a legal relation already exists in favor of one person which may be invaded in favor of another. Where, for example, a right of deviation exists, the landowner's right gives way to the right of the deviator. The deviator's right does not abridge the natural freedom of the landowner, but it overshadows, temporarily, the landowner's claim against the deviator. The landowner had a legal advantage extending beyond his own natural powers, and this legal advantage, which is an artificial extension of natural freedom, is cut down.

The example above given is that of a zynomic relation, (the landowner's claim against other persons not to trespass), but the same explanations apply also to mesonomic relations, as where, for example, an agent's power of agency is revoked. The agent's power to bind his principal is a simple power, since it is opposed by a conflicting nexal power to work a revocation. The agent's power was an artificial extension of natural freedom which was cut down by the principal's act of revocation.

(3) The third method involves the operation of giving the servus of the relation, against his will, a new legal advantage for an old one (as where a contract is broken); of creating a legal advantage in the servus where none existed before (as where an offer of contract is made); of altering an existing

legal relation or of creating a new servient relationship as against the servus, but with his implied consent, where none existed before (as where an agent has power to bind his principal in a contract with a third person under a revocable power of agency); or of relieving the servus of a legal relation of his ligation.

Application of the first method is the exclusive field of zyg-nomic relations. The third method sums up the field of meso-nomic relations. The second method is apportioned to zyg-nomic and mesonomic relations. It is that field of jural relations in which are found the interesting and technically difficult phenomena of jural conflicts. The distribution of the ground is a simple operation since where jural conflict exists the dominant relation always is a zyg-nomic relation, and the dominated relation is a mesonomic relation.

**9. Definitions.**—With the foregoing preliminary exploration we are now prepared to sum up the whole matter.

The basic and primitive element in the notion of jural relation is simple physical force exerted by one over another. That, too, is the basic and primitive element of law itself. Modern life in so large a measure has cloaked these brutal realities that the occasional reappearance of these ultimate forces in legal society appears now to be alien and abnormal; but, in the last analysis, they remain as the foundation and the ultimate resort in the maintenance of the legal establishment and for the preservation of the life of the state.

The scope of law also has changed with the centuries, and this enlargement of its field has carried with it in parallel fashion a broadening and likewise an attenuation of legal relations. The three methods for the regulation of human conduct developed historically, with the irregularity and inconstancy of movement which characterizes social institutions, in the order given. The earliest stage was limited to physical constraint. The next step was to put pressure on another for the adjustment of human interests by taking away either temporarily or permanently a legal advantage already attained. The realization of this step was an epoch-making advance in the material and intellectual development of legal ideas. The last step, the employment of the

idea of legal relations not involving physical constraint, for the purpose of rationalizing the jural process marks the latest stage reached by legal science. But it needs to be emphasized that the primitive element of raw physical power remains as a residual and ultimate factor directly or indirectly implicated in the idea of jural relation.

A legal relation is the concept abstracted from a situation of legal and material fact by virtue of which one person presently or contingently, and either directly or indirectly, may control the range of natural physical freedom of movement of a human being in favor of another person.

A zygnotic relation is that kind of legal relation the evolution of which with the support of the law directly abridges the natural physical freedom of the servus of the relation or directly abridges his power to control the natural physical freedom of another.

A mesonomic relation is that kind of legal relation which in a jural series may result in the creation, alteration, or destruction of a zygnotic relation.<sup>2</sup>

A jural relation is the conceptual fact of diminution of the (legal) personality of one person and a corresponding addition to the (legal) personality of another.<sup>3</sup>

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<sup>2</sup> There are at least two important exceptions that require a slight amendment of the formula. Claims and powers against the sovereign or of one sovereign against another, while conveniently treated as mesonomic relations, can never become zygnotic relations since in the case of sovereign and subject there can be no constraint of the sovereign and in the case of two sovereigns there is not yet a third entity that supplies the organized force of law.

<sup>3</sup> The question often is asked what difference, if any, exists between a legal relation and a jural relation. There is no substantial difference. The difference is purely formal. The terms may be, and often are, used interchangeably, but if any real distinction is to be made, a legal relation signifies an actual or assumed relation, while a jural relation signifies an abstraction of the ultimate juristic elements of a legal relation or signifies a legal relation without particular reference to an actual state of facts existing or assumed to exist. Depending on the degree of abstraction involved, the use of one term or the other may be largely a matter of choice, especially if a contrast is to be brought out.

In the above definitions, there is no difference between a legal relation as defined and a jural relation as defined. There is, however, a formal distinction. The definition of 'legal' relation is based on detailed elements which are abstracted into their ultimate form in the definition of 'jural' relation. What is above defined as a 'legal' relation could with propriety be denominated a 'jural' relation since it deals with an abstraction. Here

it is a matter of choice to denominate the first a 'legal' relation and the last a 'jural' relation to emphasize the contrast in the definitional treatment.

The definition of jural relation requires an explanation or definition of its own terms which are used here in a somewhat special and rigorous meaning.

The term 'person' (*persona*) is any entity to which the law attributes a capacity for legal relations. A legal person (*persona*) is not the object personified (e. g., a human being, a group of human beings, a succession of human beings, a chattel, lands, etc.) but is the legal concept of personateness used in the law for convenience of analysis and sometimes, for the convenience of justice, as a point of reference in the conceptual distribution of legal advantages and disadvantages.

Personality is the sum total of the legal advantages and disadvantages of a person (*persona*). (The term 'status' might have been used instead of 'personality' except for the troublesome fact that the term 'status' is already in use with several distinct meanings. It seems to be easier here to suggest the substitution of a new term than to expect uniformity in the use of an old term.) Legal Personality (which must not be confused with 'personateness') may be likened to a ledger account with credit and debit entries. Each entry signifies a legal relation of which the legal person is a *dominus* (creditor) or *servus* (debtor). A jural relation, therefore, augments the personality of one legal person (*dominus*) in the same degree that it abstracts from the personality of another legal person (*servus*).

The definition of jural relation, it may be added, includes all legal relations whether *zygonomic* or *mesonomic*.

## CHAPTER VI

### JURAL OPPOSITION

1. Legal relations are the units of legal reasoning.
2. Jural opposition.
3. Conflict of jural relations.

1. **Legal relations are the units of legal reasoning.**—In legal analysis, the starting point is the isolation of the legal relations involved in specific problems. Legal relations are to the lawyer what atoms are to the chemist. In many, and perhaps most legal problems that arise in practical life, the legal relations to be dealt with are already so obvious that the intellectual operation is concerned chiefly with an application of legal rules rather than the interplay of legal relations. The customary legal operation deals with legal relations in the rough and in the mass with hardly any consciousness of the juristic detail that goes with it. Many legal problems can not be conveniently, and at the same time accurately, treated without a clear recognition of the juristic elements that enter into them. In order that the discussion which follows may be properly introduced, it will be desirable to survey a few elementary juristic facts.

*Kinds of jural relations.* A jural relation is constituted of two legal persons. These two legal persons are related to each other by means of a potential act which may pass from one to the other.<sup>1</sup> This potential act is a jural act in that if and when accomplished it has certain definite jural effects. It is plain, since in a jural relation there are only two legal persons, that the jural act in any jural relation can have only one of two directions; it may proceed from one against the other. This

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<sup>1</sup> Human beings are usually the representatives of legal persons. The jural act need not impinge on a human being. Thus, a duty may be performed by dealing with an object, as in contracts of work and labor. Nor need the act proceed from the human being who represents the active legal person in a legal relation. Many duties may be performed by an agent. In Roman law, payment of a debt could be made by a stranger to the debt without the debtor's knowledge. The jural act passes between the two legal persons only in a juristic sense; that is to say, when done they have a legal effect upon the other legal person acted against.



necessary limitation on the jural direction of acts then results in two basic jural relations: (1) the jural act moves from the servus to the dominus; or (2) the jural act moves from the dominus to the servus. The first relation is a claim-duty relation; the second relation is a power-liability relation.

There are two derivative forms of these two basic relations which are used for the purpose, it seems, of putting emphasis on positive acts and for the purpose of avoiding in the statement of a legal proposition negative acts. An immunity is usually a positive form of a negative duty. When we say that a certain person is immune from arrest (i. e., a positive act), it is the same thing as saying that the same person has a claim not to be arrested (i. e., a negative act); there is a negative duty not to arrest him. When a privilege is emphasized, it is always in a positive form of power even though the term 'privilege' is used. Thus we say that the holder of a right of way has a privilege of entering on the servient estate (i. e., may decline the negative act of not entering) which is the same thing as saying that the easement holder has the power to enter the servient estate (i. e., to do the positive act). Since jural acts are positive or negative, these derivative forms of jural relations serve the purpose of making it possible to express jural relations in positive form. These derivative forms also exhibit the same limitation in the direction of jural acts; the jural act moves from the servus to the dominus or from the dominus to the servus, but in both cases the act is legally obstructed at its inception.

These four forms of jural relation may be illustrated by the following diagram:

TABLE NO. I

DOMINUS		SERVUS
<i>Advantage</i>	<i>Correlatives</i>	<i>Disadvantage</i>
Claim	←	Duty
Immunity	] ←	Disability
Privilege	] →	Inability
Power	→	Liability

[*Explanation:* The arrows show the direction of the act. The square brackets mean that the act can be obstructed.]

The dominus (or holder) in a jural relation has a certain legal advantage as against the servus (or bearer). This advantage is either a claim (or immunity) or a power (or privilege). The servus bears a corresponding disadvantage. This disadvantage is either a duty (or disability) or a liability (or inability).

The following examples will illustrate the scope of the terms:

(1) The dominus may be a creditor of a debt. He has a capability<sup>2</sup> to require the debtor (servus) to pay, with the support of the law. This capability is his legal advantage, and it is his claim to the act. The debtor (servus) bears a duty to perform the act of payment. This duty is the disadvantage (or ligation) of the debtor.<sup>3</sup>

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<sup>2</sup> 'Capability' is used here in the specific sense of legal advantage. It is a more flexible term than 'legal advantage' and is needed as a synonym. There is still another synonym in common use, the term 'right.' All legal advantages, therefore, are 'capabilities' and 'rights.'

There does not seem to be in current use any antonym for 'capability.' The word that naturally suggests itself, 'incapability' would be as awkward to designate a duty (which is processive in jural character) as is the word obligation as applied to a liability. There are, however, two other words that serve the purpose of pointing out the servient side of jural relations: the term 'disadvantage' which is juristically accurate for all cases but difficult to manipulate; and the term 'ligation' which has the merit of considerable flexibility in noun, verb and adjective forms.

The term 'capability' has a special value in providing a distinctive word that can not be confused with capacity. Capacity is the general attribute of legal personateness. It is the base upon which legal 'capabilities' (advantages, rights) and 'ligations' (disadvantages) rest. A legal person may have a 'capacity' to have a specific claim or power without actually having that claim or power. Thus, an adult has a 'capacity' for being the holder (dominus) of contract claims or duties, but an infant while having a capacity for contract claims has an 'incapacity' for contract duties. In legal discourse 'capacity' is often confused with 'capability' and it is highly desirable to keep these important ideas sharply separated.

<sup>3</sup> While the debtor is ligated to perform his duty, yet it is interesting to observe that he can not perform his duty as servus. Put in another way, we reach the startling result that a duty as duty is not performable. This may be shown by an illustration. If the debtor's duty is 'to pay money,' he can not pay this money except by making a tender of it, and even that does not destroy the duty since the creditor must accept the tender before the duty is destroyed. If, for further illustration, the duty is one which does not require for its completion any act on the part of the dominus, as, for example, if *A* is under a duty to *B* to perform an act on his (*A*'s) own land, the duty is performed as a power and not as a duty. The legal effect of the exercise of the power is to destroy the duty. This curious situation is due to the juristic fact that a legal phenomenon of whatever sort can only be produced by the dominus of a jural relation. The servus of a jural relation can not, therefore, as

(2) A judge while in the discharge of his judicial duties is immune from arrest. As the dominus of the jural relation whose content is the act of arrest, he has a capability of repelling with the support of the law the act of arrest. The arrest officer bears a disability to make a lawful arrest. This disability in its reciprocal form is also a duty not to make the arrest corresponding to a claim that the arrest shall not be made.

(3) A servant has a privilege to use his master's chattels in the course of employment. While the relation subsists, the master bears an inability to require, with the support of the law, the servant to refrain. Ordinarily, there would be a duty not to use the chattels owned by another; that is to say, there would be a negative duty not to use the chattels. But the servant may, without the disapproval of the law, use the chattels; that is to say, he has a capability to decline the negative act and the master is unable to require the negative act. The privilege to decline the negative act is the reciprocal of the power to do the positive act (i. e., use the chattels in the course of employment) corresponding to the master's liability that such use shall be made.

(4) A parent has the power to correct his minor son by physical means. He has a capability to act against the child and the child bears (is ligated to) a liability that such physical correction shall occur.

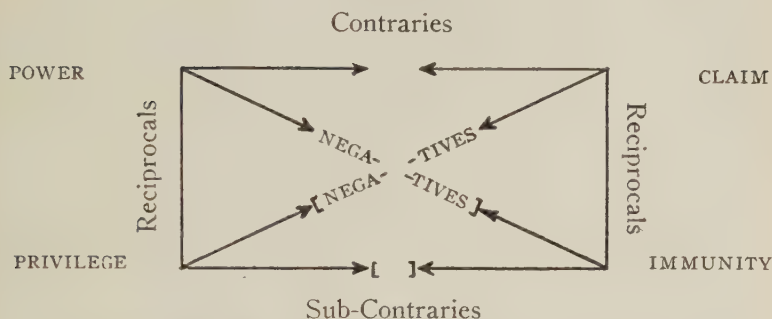
**2. Jural opposition.**—For the purpose of explaining the manner in which legal relations are juristically contrasted, we shall first set out the table of jural opposites. This table may be constructed either from the standpoint of the dominus or from the standpoint of the servus. The juristic results will be the same in both cases, since a jural capability necessarily defines the jural ligation, and, contrariwise, a jural ligation (duty, disability, etc.) necessarily defines the jural capability (advantage). This is due to the fact that both terms (advantage and disadvantage) are in turn defined by the same jural act. The table presented is constructed on the basis of jural advantages.

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servus produce any legal phenomenon (i. e., create, change, or destroy a jural relation).

It follows that duties and disabilities (the reciprocals of duties) while juristically classified as 'active' ligations (i. e., requiring an act of the servus) are 'active' ligations only in an accounting sense. No ligation can, in the juristic nature of things, be an 'active' ligation for the purpose of producing any legal phenomenon whatsoever.

TABLE NO. II

JURAL OPPOSITION.<sup>4</sup>

(1) *Jural contraries*. Power and claim are jural contraries. In contraries there are opposed directions of the content (act) of the jural relation. In a power the dominus can act effectively against the servus; the act proceeds from dominus to servus. In a claim, the jural act required is one to be performed by the servus for the dominus; the act proceeds from servus to dominus.

Since in power and claim the content of each (i. e., the power act and the duty act) is jurally determined to move without interruption between dominus and servus, these two types of jural relation are progressive relations. They are, moreover, the basic forms of jural relation and the other two forms (privilege and immunity) are merely derivative forms employed chiefly for the convenience of professional speech, not, however, merely as synonyms, but rather to emphasize a positive (act) and exceptional form of the basic relations when the latter are expressed in negative (act) form.

(2) *Jural reciprocals*. Jural reciprocals are the sub-types of power and claim arranged in conjunction with their principal types. Privilege is a kind of power put in the form of privilege, either to indicate an exceptional form of power or to emphasize

<sup>4</sup> This table, it will be quickly seen, is the so-called square of logical opposites. There is, however, an important difference in its application. Logical opposition deals only with propositions, while jural opposition deals only with terms.

the positive aspect of a negative power. Jural reciprocals were unconsciously developed in the professional speech of lawyers centuries before there was any serious attempt at scientific discrimination in the use of jural terms and nearly as many centuries before the fundamental importance of the idea of jural relation was recognized. The needs of professional speech and the intuition of the professional mind long antedated juristic science. It has perhaps always been more difficult for the human mind to deal with a negative idea than with a positive idea. For example, when there is a duty to pay money, it is easier and more direct to think of the positive act of the tender of payment than to focus attention on the same duty transformed into a negative (i. e., a duty not to omit a tender of payment). Even in those duties, for the greater part unpolarized, which are expressed in negative form, for example, the duty not to molest another's corporal integrity, there is a certain element of indefiniteness in the idea which is not overcome even when the means and method of such corporal infringement are more positively stated. It is not the practice, therefore, of professional speech to transform positive duties into negative immunities, but, on the other hand, it is not the practice of professional speech to transform all negative duties into positive immunities. The linguistic function of immunity seems to be the expression of an exceptional form of negative duty; for example, a legislator is immune from arrest, which is only another way of stating that the arresting officer bears the duty not to arrest a legislator.

What has been said of immunity applies also to privilege, but apparently in an increased measure in the adaptability of the term.<sup>5</sup> This greater adaptability is due to the fact that negative powers are rare, while, on the contrary, negative duties are very

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<sup>5</sup> An effort has been made by some writers to bend the use of the term 'privilege' to the idea of lawful acts. In the proper sense, in a sense that will conserve the term long emphasized in lawyers' parlance, this adaptation goes entirely too far in three directions: (1) It obliterates the word 'liberty,' which is always useful to indicate an absence of jural relation; (2) it mutilates the term 'privilege' used in a precise and limited juristic meaning; (3) it makes it difficult in application to distinguish the exact scope of the term 'power.' The usage criticized exalts the indefiniteness of words, making a merit of inexactness, and it disregards entirely the need of categories of jural relations.

If another term is needed for licit acts, the term 'privilege,' which is hallowed by two thousand years of lawyers' usage, should not be sacrificed



abundant. It follows, therefore, that the term 'privilege' may often be used as convertible with power, although the clear tendency is to employ 'privilege' as an exceptional kind of power. For example, the lawyer's term, 'privileged defamation,' expresses both the idea of privilege and of power—a power to defame (a positive act) and the privilege of declining the negative duty not to defame. It would be inconvenient to say that one has the privilege to decline the negative act of not uttering a slander while giving testimony in a lawsuit or when answering in good faith a request for information concerning a former employee. Analytically, the statement is perfectly correct, but it is difficult for the mind to focus upon a mere negative, and yet it is over-emphatic to assert that one has a power supported by the law to utter a slander. Consequently, the exceptional character of the relation and its declinatory aspect (privilege) is united with its processive aspect (power) under the expression 'privilege to (do the act in question)' or in another form a 'privileged act.'

The terms 'immunity' and 'privilege,' therefore, are usually employed to indicate a recession from duty which departs from the general rule. That is to say, as applied to the illustrations above instanced, there is ordinarily no duty not to arrest persons charged with crime and ordinarily there is a duty not to defame others. If the arrest can not be made because of a special legal advantage in the person to be arrested, his legal relation is one of immunity. If a slander may be uttered without the law's disapproval, the legal relation indicated is one of privilege.

Since claims and immunities and powers and privileges, respectively, are reciprocals, they are theoretically always convertible. Whatever is a claim may be expressed in another form as immunity; whatever is a power may be expressed in another form as privilege. It has been suggested that this formulation of

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to this supposed requirement. The evil, it may confidently be asserted, will destructively outweigh the assumed good to be attained if by any possibility, difficult to accept in the face of the wide and deep current of usage against it, the effort to supplant the definite term 'privilege' by giving it a new enlarged meaning, could succeed. It may be noted that those writers who employ the term 'privilege' in this wide sense of whatever is not unlawful, which includes liberty, a concept outside of the law, confuse jural and non-jural relations.

jural relations produces uncertainty in the application of 'immunity' and 'privilege,' but the objection is without merit for the reason already stated; i. e., anything that is a claim is also an immunity and anything that is a power is also a privilege, and vice versa. It may be admitted that there is or may be some measure of uncertainty in the actual practical choice of terms in each of these two groups of reciprocating terms and that the basis of choice is mental convenience in avoiding negative expressions or emphasis of the exceptional character of the jural relation presented. What is mental convenience is difficult to determine by general rule and for individual minds is probably impossible. What is exceptional is perhaps not so difficult, but yet there is a margin of uncertainty. The objection confuses a matter of science with a matter of practice. This may be illustrated in this way: the syllogism has a formal structure of three propositions, but the order in which propositions are manipulated by any given human mind does not submit to any rule. Juristic science is able to deal with and completely describe any legal phenomenon in terms of claim and power. It has no need as science for the reciprocal terms 'immunity' and 'privilege,' but the human mind does have that need, and juristic science ministers to it by presenting the necessary scientific co-ordination. The spheres of science and convenience are distinct and neither can give rules to the other.

(3) *Sub-contrary relations.* Claims and powers are contraries in the opposition of the direction of the act which is the content of the jural relation. Since immunities are the reciprocals of claims and since privileges are the reciprocals of powers, immunity and privilege necessarily also are contraries. They are distinguished from the basic contraries by the designation 'sub-contraries.' Claim and power are progressive relations, and immunity and privilege are regressive relations. In claim and power the act is progressively (directly) contrary; in immunity and privilege the act is regressively (indirectly) contrary. It can readily be seen that when an immunity and a privilege are turned into their reciprocating forms, that they also become progressively contrary; that is to say, there is direct opposition of jural direction.

(4) *Jural negatives*. This category relates not to the mechanical distinction presented by contraries and sub-contraries of an opposition of direction of a jural act, but is based on a quality in the act itself. That quality is a simple affirmation or denial of the legal capability of a given person to require a given direction of the jural act, or to decline it thereby giving it a contrary direction. As the above table shows, there are two sets of negatives. Claim and privilege are negatives, and power and immunity are negatives.

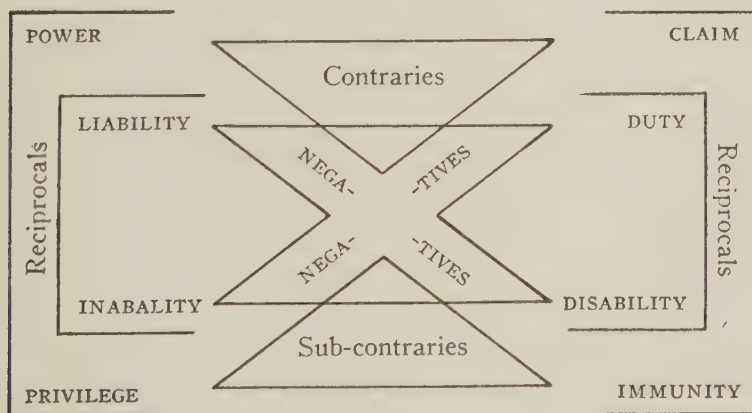
Where there is a jural claim, the dominus *can* require the servus to perform an act. Where a privilege exists the dominus *can not* be required to perform the act which is the content of the privilege.

Where a power exists the dominus can act with legal effect against the servus of the relation. Where an immunity exists the dominus can with legal effect repel the act which is the content of the immunity relation.

For a better understanding of the above discussion and also to lay a foundation for the explanation of juristic conversion, the logical relations of jural relations among themselves may be shown with the accompanying correlative of each right and ligation by the following diagram:

TABLE NO. III

## JURAL OPPOSITES



It may be observed as a matter at least of logical curiosity and perhaps also of occasional practical importance, that the negation of any given term leads by reciprocation to a contrary. Thus, if *A* is owner of Blackacre and if *B* does not owe *A* a *duty* to enter the land, then necessarily *B* has a *privilege* (e. g., by way of easement or license) to enter the land of *A* and *A* has an *inability* to require *B* to stay off. Accordingly, *B* has a *power* to enter the land and *A* has a *liability* that the land may be entered.

The same process may be repeated from the point last reached. Since *B* as shown has a *power* to enter the land, he (*B*), does not have a *disability* not to enter and *A*, since he bears a *liability* that *B* may enter, has no *immunity* against *B*'s entry, so that we reach the juristic point from which we started, since where there is no *immunity* there can be no *claim* and since there is no *claim* contrary to the *power* of entry, there can be no *duty* which was the point of beginning. The same analysis may be repeated for each of the other terms and it is immaterial whether we begin with a right or a ligation.

Incidentally this demonstration may be put forward as a logical proof of the coherence and unity of the arrangement shown of jural relations. The logical completeness of the arrangement already has been shown by an analysis of conduct.

**3. Conflict of jural relations.**—As is shown in detail elsewhere, jural relations are of two kinds in juristic quality—zygnomic and mesonomic. This distinction is one of first importance, and legal analysis can not be carried out on a basis of clearly defined ideas without this important distinction. In the light of this distinction it is to be observed that there may be actual practical conflicts of jural relations.

For example, the legislator may be immune from arrest, but the servus of the relation still, as a practical matter, has the power to make an illegal arrest. There are but few infrangible claims (i. e., claims that may not be destroyed by breach of duty) and perhaps no immunities (in the sense of exceptional kinds of claims) that are perfect (i. e., that may not be violated).

The legislator's immunity<sup>6</sup> from arrest, although supportable by law, can be practically overborne by the arresting officer's wrongful exercise of his power of arrest. The immunity is a nexal<sup>7</sup> immunity and the power is a simple<sup>8</sup> power, but yet the relation of inferior significance may destroy the relation of superior worth.

While there may be actual practical conflicts of jural relations, such conflicts can not exist in zygnomic relations. If there is a nexal claim to the payment of \$100 there can not be a nexal privilege not to pay it or a nexal power not to pay it, since the claim is in jural opposition both to privilege and to power. In like manner, if there is a nexal immunity against an act of a public officer there can not be a nexal power or a nexal privilege to do that act since immunity stands in jural opposition both to power and to privilege. And, again, in like manner if there is a nexal power to enter another's land, there can not be a nexal claim that he shall not enter or a nexal immunity against his entering.

In a word, claim and immunity and power and privilege are in logical contradiction, and neither term of either group can logically exist if either term of the other groups exists, as to the same jural act.<sup>9</sup>

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<sup>6</sup> Some writers prefer to use the term 'immunity' in the invariable sense of a legal condition which can not be impaired. Thus, it is said that a landowner's title can not be divested by a paper transfer made by a stranger to the title. It is difficult to see the application of the idea of immunity where there is no power that can threaten for any purpose whatsoever. One does not need an immunity from what does not exist. It is like an immunity from smallpox in a world where smallpox germs are not found. Strangely enough, the same writers do not (at any rate, they can not logically) concede to a legislator an immunity from arrest, since undeniably there is a power of arrest.

<sup>7</sup> The term 'nexal' is applied to any jural capability in a zygnomic relation. Instead of saying 'zygnomic claims', it is more convenient to speak of 'nexal claims.' The term 'zygnomic' indicates the character of the jural relation, and the term 'nexal' designates the jural quality of the specific capability in question.

<sup>8</sup> The term 'simple' has the same application to mesonomic relations that governs the term 'nexal' with respect to zygnomic relations.

<sup>9</sup> The process of juristic conversion which is based on the above table of jural opposition is treated elsewhere. By the process of juristic conversion the negation of one term results in its corresponding negative. Thus, a no-claim becomes a privilege, a no-privilege becomes a claim, a no-power becomes an immunity, and a no-immunity becomes a power.



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Reduced to the simplest basic terms, juristic conversion results in this, that a negation of claim gives a power (or its reciprocal) and that a negation of power gives a claim (or its reciprocal). It may be doubted, however, whether this process has any important practical utility in legal analysis, since it is based on an assumed affirmation derived from a general negation.

## CHAPTER VII

### JURISTIC CONVERSION <sup>1</sup>

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| 1. Affirmative and negative aspect of jural terms.<br>2. Dichotomy.<br>3. General negatives.<br>4. Negative relations.<br>5. Relations negative in substance can not be jural relations. | 6. Confusion in application of negative relations.<br>7. Jural character of the declaratory judgment procedure.<br>8. Ultimate and specific negatives.<br>9. Implication of juristic conversion.<br>10. Process of juristic conversion. |
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**1. Affirmative and negative aspect of jural terms.**—Jural terms may be considered either in an affirmative or negative aspect. When we speak of Claim, of Immunity, of Power, or of Privilege, we are dealing with the affirmative side of jural relations. The same is true if we speak of the respective correlatives of these terms—Duty, Disability, Liability, and Inability.

For the negative aspect, we have only to prefix the word 'No' to any one of the above terms. We arrive then at the following table of affirmative and negative relations:

TABLE NO. I

#### AFFIRMATIVE AND NEGATIVE RELATIONS

Claim	—	Duty
No-Claim	—	No-Duty
Immunity	—	Disability
No-Immunity	—	No-Disability
Privilege	—	Inability
No-Privilege	—	No-Inability
Power	—	Liability
No-Power	—	No-Liability

<sup>1</sup> There are certain logical operations known as simple conversion, conversion by limitation, obversion, and contraposition which are analogous to juristic conversion, but the processes of logical reduction differ from juristic conversion in one essential respect, in that they deal, not with single terms as in juristic conversion, but with propositions. For example, the proposition No *X* is *Y* may be converted into No *Y* is *X*.

2. **Dichotomy.**—If a concrete but yet unidentified relation is under investigation we may say of it: (1) That it is jural or not jural; (2) if jural, that it is processive (i. e., a duty or a power relation) or recessive (i. e., a disability or privilege relation); and (3) that the processive or recessive quality is dominant or servient. For relations, from the jural standpoint, this is the process of exhaustive division in accordance with the logical rule, 'divisio non faciat saltum.' The process consisting of these steps differentiates a given relation as a jural relation, and enables us to state precisely what jural relation is given.

For example, if the final result is a dominant processive relation, we know that the relation is a power relation. If the result is a dominant recessive relation, we know that it is a privilege relation. If the result is a servient processive relation, the specific relation is a duty relation. If the result is a servient recessive relation, the specific relation is a disability relation.

The explanation can best be understood by a table which shows jural relations in an active aspect (i. e., as processive or recessive):

TABLE NO. II

## PROCESSION AND RECESSION IN JURAL RELATIONS

Dominant		Relations		Servient
Passive	Claim	←	Duty	Processive
Passive	Immunity ]	←	Disability	Recessive
Recessive	Privilege ]	→	Inability	Passive
Processive	Power	→	Liability	Passive

It will be seen that there are two processive relations and also two recessive relations. In each group, one is dominant and the other servient. It is, therefore, simply a matter of

mechanically selecting the specific relation described as processive or recessive and as dominant or servient.

While the process of dichotomy as applied to jural relations is an allowable one, and while it probably can be availed of oftener for practical purposes than the process of dichotomy as applied to the natural sciences, yet it will rarely be used since there are only two basic kinds of jural relation (i. e., the claim-duty relation and the power-liability relation) which can hardly be juristically confused once they are understood. In other words, a duty to do an act can not be confused with the power to do an act, if both relations are of the same jural quality. There may, however, occasionally, be some scope for the operation of dichotomy as applied to recessive relations since they are not always clearly marked out in legal analysis. In any event, for whatever it may be worth for practical purposes, the process is set out and it is found to be a simple one.

**3. General negatives.**—We must distinguish between negative *terms* as applied to relations and negative *relations*. Thus, the expression 'no-duty' is a negative term; it is a general negative since it contradicts only the idea of duty. There may, however, be a 'no-duty' and still be, for example, in the same person and in the same reference, a 'claim,' or 'power,' or some other right or ligation. On the other hand, the term 'no-duty' may import not merely the absence of duty, but likewise the absence of any right or ligation whatsoever.

General negatives, therefore, may have three possible meanings: (1) They may be universal negatives, contradicting only one idea and leaving it entirely uncertain whether in the same reference there is any other relation jural or otherwise; (2) a general negative may negate not only the idea specifically contradicted but also in the same reference any other right or ligation; and (3) a general negative may negate not only the idea specifically contradicted but also in the same reference may import some other right or ligation.

**4. Negative relations.**—Here, again, it is necessary to note a distinction. A given relation may be negative in *form* or nega-

tive in *substance*. The claim not to have a trespass committed and the correlative duty not to commit the trespass constitute a jural relation which is negative in form. The content of the relation is a negative act, i. e., not to trespass. This is a jural relation even though the form of it is negative. But, on the other hand, if, as to a given act, there is no duty or power or disability or privilege, there is no jural relation. It is a no-jural relation. From the standpoint of the law, since the law will take no notice of that act for any purpose whatsoever, the relation is negative in substance.

**5. Relations negative in substance can not be jural relations.**—It is sometimes urged that any fact which comes within the scope of adjudication necessarily imports a jural relation, if only it is relational in form. Thus it has been supposed that the lack of power in *X*, a stranger to a title, to convey it, is a jural immunity in *O*, the owner, and that *X* and *O* are in jural relation (nexus) to each other as to the specific act in question (i. e., an attempted transfer of the title) since if the matter should be juridically presented, in any way, it would be judicially determined that *X* had no power to affect the interests of the true owner. Barring any question of disparagement of title, and assuming that the term 'no-power' does not import any other right or ligation, it is quite impossible to conceive of the situation under discussion as presenting any jural relation whatsoever, either zynomic or mesonomic.

It may be readily admitted that a determination of the fact of the lack of power may be practically important, but the case does not differ from the determination in the course of litigation of the negative of any other mere assertion of jural relation. The law, however, never, so far as concerns the judicial function in the strict sense, deals with anything but jural relations. If *X* has no power to affect *O*'s title by a given act, whether that act be a paper deed or perchance an oral grant or perchance some other ceremony unknown to the law of conveyancing, there is no substance in *X*'s act. It is a simple nullity and no jural relation can be built around it.

Another reason that may be advanced against the admission



of a jural relation in such a case is that the number of jural relations is limited to two basic forms and two derivative forms. If a given situation does not fit into one of these four forms, it can not be a jural relation. This, of course, is upon the assumption that there are only four such forms, and that the character of these forms is that already elsewhere defined.

It has been suggested that there is juristic convenience in having suitable terms to indicate the no-power of *X* and the legal situation of *O*, in the problem under discussion. That convenience is admitted, but it can not be admitted that what is negative in substance can be a jural relation. That demand exceeds at once the bounds of juristic convenience and juristic truth. Nor, again, on the same basis of convenience can it be admitted that the terms especially adapted to jural relations can be used for non-jural relations. On the matter of terminology, the term 'no-power' is unobjectionable since it clearly negatives jural substance, but the term 'immunity' to describe the legal situation of the landowner (in the problem given) is inappropriate since that term has another juristic signification than the one intended here. Fortunately, the difficulty at this point is not a serious one, since other words are available as substitutes. The serious objection, therefore, is not one of terminology but of attempting to include among jural relations those relations of fact which lack jural substance. The effort to treat such relations as jural relations can not but have an injurious effect if introduced into a system of jural ideas seeking to be organized upon a logical foundation. In a word, the question of what is necessary and convenient for juristic terminology is subsidiary to the question of what are the actual jural levers and data of the law. The fundamental jural operation must be clearly isolated first, and then terms may be employed to designate them, but these operations can not be governed by terms; their intrinsic nature can not be affected by terms; nor should any other ideas be imported under a similar terminology, unless the ideas named also accord in substance with what the terms purport to represent. From any point of view, whether of convenience in the use of terms or of clarity of fundamental jural concepts, a relation negative in jural substance must be

kept apart, both from the system of jural relations and from the terminology of jural relations.

Jural relations can not be dealt with like minus quantities in mathematics. A minus quantity in mathematics is a mathematical existent; it may have an influence on a plus quantity; but in legal science a minus quantity (for example, a no-claim) is wholly inert. Any attempt to make the science of jural relations an equational science must fail, since it can deal only with plus quantities.

**6. Confusion in application of negative relations.**—The negative declaratory judgment has been instanced as an example of a jural relation involving the formula of no-claim and no-duty. The negative declaratory judgment is, in effect, simply a reversal of the ordinary legal procedure. Usually the asserter of a legal relation begins the offensive by commencing suit. In the declaratory judgment procedure, the denier of a legal relation claimed by another begins the offensive. He asks the court to declare that the respondent has no-claim against him. Where the asserter in his suit fails and where the denier in his suit prevails, the procedural result is precisely the same. The judgment is 'no-claim' or 'no-right' in each case. The court has adjudged a negative in each case. Does it follow then that the 'no-claim' before suit was a legal relation? It has been urged that it must be so, since the court has adjudged a 'no-claim.' The court could not adjudge a 'no-claim' unless that 'no-claim' already was a legal relation; but there is confusion here; one thing is taken for another.

Assuming that the judgment of 'no-claim' operates as *res judicata*, we may then also infer that the asserter of the claimed legal relation is now put under a duty not to re-litigate the same claim. If there is such a legal duty (and there is proof of it since the claimant will be brought to halt if he re-litigates) does it follow that the claim asserted was a legal relation? Or does it not rather appear that the 'no-claim' before suit and before judgment was not a legal relation, now that the court has pronounced that the asserter violated a legal duty in asserting his 'no-claim'? The 'no-claim' is one thing; the assertion of it is

another. It is a legal wrong to assert a 'no-claim' and the court visits the sanction of nullity upon the illegal act and at the same time imposes a new legal duty not to assert the same 'no-claim' again. The judgment of 'no-claim' therefore does two things: (1) It brings the asserter of the 'no-claim' to a full stop in the procedure; (2) it imposes a new duty on him not to litigate the same 'no-claim' again. It is impossible to find in these procedural steps any jural recognition of the asserted fact that the 'no-claim' at any time was a legal relation. There is here, as elsewhere, no jural substance in a 'no-claim.' It is a negation of jural relation.

What does not exist can not be acted upon. It seems to be supposed, however, that the court in some way deals with the 'no-claim.' Herein lies the confusion. The court does not act upon a 'no-claim' since there is nothing of a jural character in such a relation that can be strained by the legal sieve. What the court does act upon is the unfounded assertion of the 'no-claim.' A plaintiff has a power of suit even upon a 'no-claim' and if he does not succeed in demonstrating that he has a jural claim he is stopped in the procedure as soon as the fact is procedurally brought to the attention of the court. The power to bring suit on a 'no-claim' is a jural relation, but the 'no-claim' by its very description can not be a jural relation in any sense; nor is any convenience served in creating a fiction for such a case, of jural relationship.

#### 7. Jural character of the declaratory judgment procedure.—

The declaratory judgment procedure is a step in advance, not only in procedural reform, but it involves also a consequent juristic peculiarity of its own. In the usual common-law procedure the non-procedural assertion of an unfounded claim has no legal consequences; it is not a breach of legal duty. But in the declaratory judgment procedure the non-procedural assertion of an unfounded claim does have legal consequences; it is in itself a breach of legal duty. The sanction of this duty not to make non-procedural assertion of an unfounded claim is a liability to be proceeded against in a declaratory suit. In the usual common-law procedure there is neither duty nor liability

in the non-procedural assertion of an unfounded claim; but there is a legal duty in the common-law procedure, if, not to begin an action upon an unfounded claim, at least not to proceed in the procedure beyond the point where a voluntary non-suit may be moved, since a judgment for the defendant operates as a sanction in two ways: (1) It stops the plaintiff from proceeding further, and (2) it lays a new duty on the plaintiff not to re-litigate the same claim.

**8. Ultimate and specific negatives.**—(1) It has already been shown that a general negation of a given jural relation may be an indefinite or *universal* negative which discloses nothing and leaves everything else open to possibility.

(2) A general negative may also have a special meaning to be arrived at, not by the form of the negation, but by the context where it signifies the absence of any jural relation whatsoever. Such a general negative may be called an *ultimate* negative; it is ultimate in the sense that all jural relations are excluded in the meaning.

(3) And, again, a general negative may have a special meaning to be arrived at not by the form of the negative (which is similar in all three cases) but by the context where it signifies (a) a negation of the jural relation given and (b) implies some other as yet unnamed jural relation. This last form of general negative may be called a *specific* negative; it is specific in the sense that the jural relation given is excluded in favor of another jural relation which is predetermined though as yet unnamed.

There are, therefore, three forms of general negatives as above described: (1) The universal negative; (2) the ultimate negative; and (3) the specific negative. The process by which a specific negative is reduced into its specific form from a general negation is called here 'juristic conversion.' Before proceeding to explain the process of juristic conversion, it will be useful to set out in advance a table of jural relations with their ultimate and specific forms, it being understood that the specific negative is the final result of the process of juristic conversion.

TABLE NO. III

## GENERAL AND CONVERTED NEGATIVES

3	2	1	1	2	3
Negatives		Dominant	Servient	Negatives	
Specific	Ultimate	Correlatives		Ultimate	Specific
Inability	No-Claim*	Claim	Duty	No-Duty*	Privilege
Liability	No-Immunity	Immunity	Disability	No-Disability	Power
Duty	No-Privilege	Privilege	Inability	No-Inability	Claim
Disability	No-Power*	Power	Liability	No-Liability*	Immunity

9. **Implication of juristic conversion.**—In the table last above shown there are two ultimate negatives with their correlatives which are marked with asterisks. These ultimate negatives do not imply by their own terms any further reduction. For example, a no-duty does not imply that the same person enjoys a privilege in the same reference, but by conversion a no-duty is a privilege and it can not be anything else. Again, a no-power does not imply that the same person is under a disability in the same reference, but by conversion a no-power is a disability and it can not be anything else. In other words, if we find that in a given situation there is no duty to act, that normally is the end of the matter. There is no implication in the findings that because there is no duty there must be some other jural relation. So, also, if we find that in a given situation there is no power to act, that normally is also the end of the matter. There is no implication in the finding that because there is no power there must be some other jural relation. These two forms of jural relation are progressive relations.

There is one important addition to be observed—that if the context implicates the existence of a jural relation in the same reference, then a term ultimate in *form* necessarily is reducible



to a specific negative. Both sides of this proposition may be illustrated as follows:

If *A* is the owner of Blackacre, *A* does not owe a duty not to enter Blackacre. He could not owe a duty to himself in any case and he could only owe such a duty to another based on investitive facts not here assumed. Since *A* does not owe a duty not to enter Blackacre, he does not have a *privilege* to enter Blackacre, because again he can not be in legal relation to himself, and by assumption he is not in legal relation to others in the same reference.

If, however, we now say that *A* does not owe a duty to enter Blackacre when Blackacre is owned by *B*, then, necessarily, *A* has a *privilege* to enter Blackacre since *B* is unable legally to prevent *A's* entry. In this case, an ultimate negative in form is reducible to a specific negative.

There appears to be a difference when we consider the ultimate negatives of the other two relations. A no-immunity normally indicates the existence of a liability and a no-privilege normally indicates the existence of a duty. If we examine the respective correlatives of these terms the same result follows. A no-disability normally indicates the existence of a power and the no-inability normally indicates the existence of a claim. These two latter relations are regressive relations.

The generalization that may be drawn from these facts is that the general negation of progressive relations does not normally indicate a juristic conversion, while the general negation of regressive relations normally indicates juristic conversion.

There is a striking juristic peculiarity involved in this generalization in that immunity and claim, and duty and disability, and power and privilege, and liability and inability are jural reciprocals. What is true of one in affirmative form is true of the other, yet in form of a negation what is true of one is not true of the other. Claim-duty is one of the progressive relations and immunity-disability is one of the regressive relations. Theoretically, where there is a claim to one act there is an immunity against the opposite act. Anything asserted of the claim is also asserted of the immunity since they are reciprocals. The implications of one are as broad as the implications of the

other. Yet the addition of a negative in each case causes a severance of meaning. A no-claim may be, and normally is, an ultimate negation, but a no-immunity, while it may be an ultimate negation, is normally a negation which implies juristic conversion.

**10. Process of juristic conversion.**—The process of juristic conversion involves two operations: (1) A change of direction of the act involved in the relation given; and (2) a transfer of jural dominance and a corresponding transfer of jural servience.

If, for example, the problem is to convert the term 'no-duty' the steps will be as follows: (1) Determine the jural motion of duty, which is found to be a processive ligation (i. e., the servus must act for the dominus); (2) change the direction of this relation from a processive act to a recessive act; (3) change the servus (of the duty) to the dominus of a recessive relation. If we examine Table Number II above, we find the conversion of no-duty must necessarily result in a privilege which is the only dominant recessive relation.

Illustrating this process by a dominant concept, let us convert 'no-immunity.' (1) An immunity is a dominant concept and is recessive from the standpoint of the servus; (2) changing the direction of the act, it becomes processive; (3) changing the dominus, we arrive at a processive relation pointing to a ligation. By reference to Table Number II we discover that this ligation is a liability.

Both these operations, while no doubt highly abstract and perhaps also somewhat difficult to follow on a first reading, are essentially simple, involving only the need of changing a progressive relation into a regressive relation, or vice versa, and changing the dominus to the servus or vice versa. The dominus or servus after these two changes will stand opposite the jural concept which indicates the result of the conversion.

The above method of solution of the problem of juristic conversion may be likened to an algebraic solution since it is entirely an abstract operation. The same result, however, will be reached by a process of analysis which is wholly concrete.

This will be illustrated for one of the terms already converted.

In a 'no-duty,' the servus of a duty relation is relieved of the burden of acting in favor of the dominus of the claim. He may act, but he does not act as servus. Therefore he will act as dominus of a relation to be found. A dominus can be active in only one of two ways: (1) He may exercise a power, or (2) he may exercise a privilege. The real difficulty of this method of solution is now encountered. What shall govern the choice between power and privilege? We must now examine the nature of the concept from which we started. A duty is a constraint to act. A no-duty is the absence of a constraint to act. The choice is now determined; the description points clearly to privilege, since a privilege is a capability to decline an act, while a power is a capability to act.

The same methods of solution apply to each one of the other jural concepts which enter into jural relations, and it will be unnecessary to repeat these operations for the remaining cases. The complete detail of these conversions is set out in the table last above shown. The columns at the sides represent the conversions with their respective correlations.

## CHAPTER VIII

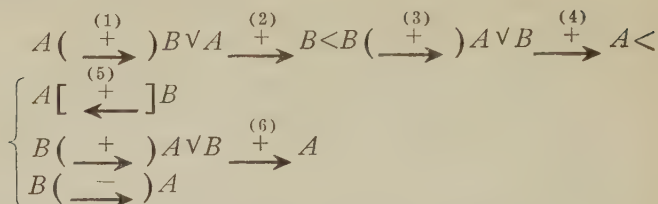
### CONJUNCTIVE AND DISJUNCTIVE JURAL RELATIONS

- |                                 |  |
|---------------------------------|--|
| 1. Adjunction.                  | 9. Uniactive and biactive conflicts.           |
| 2. Normal concatenation.        | 10. Other terms applicable to jural conflicts. |
| 3. Abnormal concatenation.      | 11. Homadic integral conflict.                 |
| 4. Conjunction.                 | 12. Heteradic integral conflict.               |
| 5. Congruence.                  | 13. Homomorphic and heteromorphic conflicts.   |
| 6. Conflict of jural relations. |  |
| 7. Logical conflict.            |  |
| 8. Integral conflict.           |  |

1. **Adjunction.**—Legal relations may be prevenient or postvenient, either (a) as to each other, or (b) as to some act or event. But legal relations in a linear series are never in strictness adjoined. Thus, the power to accept an offer is not adjoined to the power to make the offer. There is no power to accept until the power to make an offer is evolved; i. e., until an offer is made. The power to offer is prevenient to the offer and to the power to accept; and the power to accept is postvenient to the power to offer and the offer. But there is no adjunction. We can not even say that at a given moment either of these powers (relations) is adjoined to either of the evolved acts, i. e., either the offer or the acceptance, since the evolution of a jural relation destroys it. But when jural relations are represented, as shown below, in a linear (historical) series, we may then regard jural relations as adjunctive to the jural facts which give rise to jural relations or as adjunctive to the jural facts which are evolved out of jural relations.

If the series is followed either to (a) a normal conclusion (performance), or (b) to an abnormal conclusion (breach), we shall find nowhere any adjunction of relations. A corollary of the proposition is that there also are no adjunctions of jural facts. This will be illustrated by a normal and an abnormal concatenation of relations, as follows:

## 2. Normal concatenation.—



[*Explanation:* This is a linear graph of a power to offer a positive performance for a promise of a positive performance (i. e., an act for a promise) the former of which is duly tendered and accepted. Right arrows are powers. The left arrow (No. 5) is a duty. Round brackets are mesonomic relations. Square brackets are zygnomic relations.  $\vee$  = evolution.  $<$  = resulting in. Unbracketed arrows are jural acts.]

(1) is the power of  $A$  to offer to  $B$  a positive act, say \$10, if  $B$  will spade  $A$ 's garden.

(2) is the evolution of No. (1);  $A$  tenders to  $B$  the money.

(3) is the power of  $B$  to accept  $A$ 's tender and to create a claim in  $A$  requiring  $B$  to spade the garden of  $A$ .

(4) is the evolution of  $B$ 's power to divest  $A$  of ownership of the money which creates in  $B$  a duty to spade the garden. (The graphs to show  $A$ 's ownership of the money tendered and accepted and the loss of  $A$ 's ownership and the acquisition of ownership by  $B$  are not shown since these jural facts are not here in question. It may be remarked that while  $B$ 's acceptance of the money tendered created a duty in  $B$  to spade the garden, yet  $B$  did not have a power against himself to create a duty in himself. This follows for the reason that a man can not be in legal relation to himself. (cf. No. 3.) But  $B$  did have a power to create a claim in  $A$  corresponding to  $B$ 's duty. This is an apt illustration of an ingressive power, (i. e., a power against another which results in a duty of the dominus of the power.)

(5) considered as a whole is a plurinary (or complex) legal relation.  $B$  owes  $A$  a positive duty of performance. This unit relation is zygnomic; it restricts the freedom of  $B$  with the support of the law. Since  $B$  owes the duty, the law necessarily must give him the power to perform it. This power relation is a



mesonomic relation; it does not restrict the freedom of *A* but enlarges it. If *B* has the duty to perform and the power to perform, he necessarily also must have the power not to perform. This negative relation also is mesonomic.

(6) is the evolution of *B*'s power to tender performance; i. e., *B*'s willingness to spade *A*'s garden. It will be observed here that the *duty* of *B* is not evolved, nor can it be, since *B* can not act against himself. What is evolved is *B*'s power to tender performance. It may be generalized here that no duty relation can be evolved.

For the illustration given, as between *A* and *B*, this is the jural end of the matter. If the duty is performed, no new jural relation is created. If, however, instead of tendering services, there were a duty to tender a chattel, then additional jural relations would follow. There would follow after tender of the chattel, a power to accept the chattel which, upon being evolved by actual acceptance, would, as a last step in the chain, be followed by an unpolarized duty not to disturb the possession of the new owner. The juristic problem whether a tender is a conditional abandonment or is the grant of a privilege need not here be discussed.

### 3. Abnormal concatenation.—

$$\begin{array}{l}
 A \left( \overset{(1)}{\underset{+}{\rightarrow}} \right) B \vee A \xrightarrow{(2)} B < B \left( \overset{(3)}{\underset{+}{\rightarrow}} \right) A \vee B \xrightarrow{(4)} A < \\
 \left\{ \begin{array}{l} A \left[ \overset{(5)}{\underset{+}{\leftarrow}} \right] B \\ B \left( \overset{+}{\rightarrow} \right) A \\ B \left( \overset{-}{\rightarrow} \right) A \vee B \xrightarrow{(6)} A < A \left[ \overset{(7)}{\underset{+}{\leftarrow}} \right] B \end{array} \right.
 \end{array}$$

[*Explanation:* The problem graphed here is the same—an act for a promise—but the resolution is different. Here, *B* instead of performing his promise to spade *A*'s garden, fails to spade the garden, resulting, therefore, in internal devolution of *B*'s duty to *A*. The explanations stated above apply to this series of graphs up to and including No. (5).]

(6) is the evolution of *B*'s power not to perform his duty (cf. No. (6) *supra*). This evolution is a destructive evolution, and it is accordingly termed 'devolution.' Since at point No. (5) there are three interconnected (atomic) legal relations forming one (molecular) complex (or plurinary) relation, this form of devolution coming as it does from within this complex is denominated 'internal devolution' in contrast with that form of devolu-

tion which occurs when a jural fact intervenes from the outside (external devolution; e. g., death of *B*).

(7) is the legal relation which results from *B*'s failure to perform, or, more accurately, from *B*'s exercise of his power not to perform (No. 6). *B* becomes ligated to tender to *A* damages for non-performance. This relation is a zygomic relation.

The above graphs show that in no case is one jural relation directly adjoined in a linear series to another jural relation. A jural relation can only be adjunctive to a jural fact and a jural fact can only be adjunctive to a jural relation, and then only in a linear (historical) series. Therefore, jural relations are not adjunctive to other jural relations, nor are jural facts adjunctive to other jural facts. Adjunction, as used here, implies causal relation, as where a jural relation, when coming to an end, is realized in a jural act. At the moment that the act is complete, the relation ceases.

This may be illustrated in the above instance of offer and acceptance. The act of acceptance is adjoined to the preceding (power) relation to accept. It is not adjoined to the act of offer. It is connected in time with the offer act, but there is no causal relation. The offer act does not create the acceptance act. It is merely the condition for the legal operation of the acceptance.

**4. Conjunction.**—While there may not be in strictness an adjunction of jural relations in a linear series, yet plural coincident jural relations may be interconnected by (a) common derivation from the same jural fact, or (b) interconnection by supervening jural fact. This interrelation of coincident jural relations may be called *conjunction*. (A simple illustration of conjunction is given above [No. (5)] where three jural relations arising out of the same jural act [No. (4)] coincide.)

Conjunction of jural relations is to be distinguished from disjunction. If *A* owes *B* a sum of money and at the same time *B* owes *C* a sum of money, the legal relations of *A* to *B* and of *B* to *C* are disjunctive. There is no practical or juristic necessity here of dealing with the two relations in any analysis of either of them.

The test of jural conjunction is whether the evolution of one relation has any jural effect on any other relation then in existence. In the illustration above, the evolution of the third relation of group No. (5) has the jural effect of destroying the other two relations of the same group. Where coincident relations are disjunctive, the evolution of one has no jural effect on the others.

**5. Congruence.**—Conjunctive jural relations may be (a) congruent, or (b) conflicting.

Jural relations are congruent when the dominus or servus of plural relations is the same person. In conjunctive congruent relations, the dominus and servus respectively of plural relations are the same persons. If *A* has defaulted in payment of a debt owed to *B*, then *B* has a claim to receive damages for the breach and a power of suit to recover damages. Here the dominus is the same person in both relations, and the servus also is the same person in both relations, as shown by the following graphs:

$$\left\{ \begin{array}{l} B \left[ \begin{array}{c} + \\ \leftarrow \end{array} \right] A = \text{claim to damages} \\ B \left[ \begin{array}{c} + \\ \rightarrow \end{array} \right] A = \text{power of suit} \end{array} \right.$$

In disjunctive relations, the servi may be the same person or different persons. If *A* owes *B* a duty not to trespass on his land, and *A* also owes *B* a sum of money, the two relations have the same dominus and the same servus, but since the two relations are independent they are disjunctive. Where *D* has a claim that *X*, *Y*, and *Z* shall not go on his land, the three relations have the same dominus but there are three different servi.

The latter situation has traditionally been treated as a jural complex. *B* is said to have a claim against all persons in the world not to trespass. It had been supposed, until Hohfeld made his discovery of the atomic character of legal relations, that similar duties of innumerable persons converged toward *one* dominus. This view, as a figure of juristic rhetoric, may be convenient but it is not accurate since there are as many domini and as many legal relations as there are servi, although these domini are the same legal person.

The traditional view may be graphed as follows:

$$D \left[ \begin{array}{c} \longleftarrow \text{---} \end{array} \right] X, Y, Z$$

$$D \left[ \begin{array}{c} \longleftarrow \text{---} \\ \longleftarrow \text{---} \\ \longleftarrow \text{---} \end{array} \right] \begin{array}{l} X \\ Y \\ Z \end{array}$$

while the true solution is—

$$\begin{array}{l} D \left[ \begin{array}{c} \longleftarrow \text{---} \end{array} \right] X \\ D \left[ \begin{array}{c} \longleftarrow \text{---} \end{array} \right] Y \\ D \left[ \begin{array}{c} \longleftarrow \text{---} \end{array} \right] Z \end{array}$$

There are two important fields of law that deal with disjunctive jural relations treated conventionally as jural complexes. One of these, above described, is the basis of the law of Torts.

A tort is the breach of an unpolarized private duty. A duty is unpolarized when the investitive facts which create the duty do not directly identify the person owing the duty. In these instances, the emphasis, for practical purposes, is on the legal interest protected (the *res*) rather than on the persons who owe duties respecting it. This is probably the explanation of the origin of the term 'right in rem.' The term is highly unsatisfactory and we have substituted for 'right in rem' the term 'unpolarized claim.'

An unpolarized claim normally is accompanied by innumerable similar unpolarized claims against an equal number of unidentified persons. Considered as a complex, there is one dominus and a plurality of different servi owing negative duties to the dominus. The graph above shows a congruent complex of dominant convergence; i. e., the duty acts all converge in one dominus.

The other important field of law that deals with disjunctive jural relations treated conventionally as a jural complex is

Quasi-Torts (e. g., the breach of duties of innkeepers, warehousemen, carriers).

A quasi tort is difficult to define in such a way as to mark it off accurately from a tort and at the same time from other polarized relations. It is the breach of a polarized, irrecusable, private duty. It is, however, the underlying mesonomic relations that interest us here as a topic of discussion.

Before a member of the public requires service of a carrier, what is the jural situation? Two solutions offer themselves: (1) That the dominus has a simple, unpolarized, contingent private claim to have the service performed; or (2) that the dominus has a simple, unpolarized, contingent, private power to require the service. In either case, the underlying relation is mesonomic (therefore, *simple* claim or *simple* power); it is unpolarized because the investitive facts do not suggest the domini; it is contingent because various acts uncertain to happen must be done; it is a private relation because both dominus and servus are private persons. The two solutions are similar in these particulars. The only remaining question is whether the underlying relation is a claim or power relation. We believe the right choice falls to the power relation. The situation in legal effect is that of an offer which must be accepted.

The two jural complexes underlying torts and quasi torts may therefore be graphed as follows:

Complex of unpolarized  
negative claims  
*Dominant congruence*



Complex of unpolarized  
positive powers  
*Servient congruence*



**6. Conflict of jural relations.**—Conjunctive jural relations that are not congruent are in conflict. Conflict in jural relations may be either logical or integral. Before proceeding to discuss



this topic it will be desirable to consolidate the leading ideas already noted in a table.

Plurinary Relations	Disjunctive	{ Congruent Conflicting	{ Logical Integral
	Conjunctive		

7. **Logical conflict.**—Logical conflict means jural opposition as to the same act in two coincident jural relations. For example, if *B* owes *A* a sum of money, there would be a logical conflict if it could be said that *B*, though owing the money, could decline to pay it; or, to put it in juristic terms, that a claim and a privilege having the same content could both be valid.

Again, if *B* owes a duty to *A* not to trespass, there would be logical conflict if it could be asserted that *B* can trespass; or, to put it in juristic terms, that a negative claim and a positive power qualifying the same content could both be valid.

Again, if *A* has a power to make a levy against *B*, there would be logical conflict if it could be said that *B* can prevent the levy; or, in juristic terms, that a power and an immunity having the same content could both be valid.

Again, if *A* has a right of way over *B*'s land, there would be logical conflict if it could be said that *B* can prevent *A*'s passing over *B*'s land; or, in juristic terms, that a negative privilege and a positive immunity having the same content could both be valid.

Again, if *A* has a right of way over *B*'s land, there would be a logical conflict if it could be said that *A* has no power to cross the land; or, in juristic terms, that a negative privilege could exist without a positive power qualifying the same content.

Lastly, if *B* owes *A* a sum of money, there would be logical conflict if it could be said *A* can not prevent the non-payment of it; or, in juristic terms, that a positive claim could exist without a negative immunity qualifying the same content.

The illustrations above put are of the jural opposition of jural contraries, jural negatives, and jural reciprocals. Claim and power, and privilege and immunity, respectively are jural

contraries; meaning by 'contraries' opposition of direction of the act involved in a jural relation. Claim and privilege and power and immunity respectively are jural negatives; meaning by 'negatives' affirmation or denial of the jural quality (must or can) of the involved act. Claim and immunity and power and privilege respectively are jural reciprocals; meaning by 'reciprocals' the negation of the involved act with a changed sign (positive to negative or negative to positive).

Difficult as it may seem to have in the law any of the logical conflicts above illustrated, yet they do exist in the practical working of law and the law accepts them by giving them a legal operation. The law, moreover, could not do otherwise and function as a practical art. The reason, in a word, for this necessity is that jural relations, as already shown, are concatenated not only in a normal series but also in an abnormal series. The work of the courts is not in dealing with the normal concatenation of jural relations but with abnormal sequences. The work of the judge, like the work of the surgeon, is to deal with pathological conditions.

Logical conflict may exist between a zygnomic relation and a mesonomic relation.

As shown in the above detailed linear graph of abnormal concatenation [No. (5)] where there is a duty to do an act, there must be a power to perform, and if there is a power to perform, there necessarily also must be a power not to perform. The two power relations (i. e., to perform and not to perform) are conjunctive congruent relations. The power to perform is in logical agreement with the duty to perform. These two relations (i. e., duty to perform and power to perform) are conjunctive (they arise from the same jural fact); they are incongruent (the domini are different); but they are in logical accord since the very act required by the duty is evolved by the power to perform. But the duty to perform and the power not to perform are in logical conflict. There is a duty to do an act and contemporaneously there is a power not to do the same act with legal consequences. The duty relation is zygnomic; the power relation is mesonomic.

Logical conflict may exist between two mesonomic relations. If *B* owes *A* a sum of money and the statute of limitations has run against *A*'s claim, then *A* may not with the support of the law maintain the claim against *B*'s power to interpose the bar of the statute. In this case, *A* has a simple claim to have the money tendered by *B*, but the law will not support *A* in his claim as against *B*. On the other hand, *B* can decline to tender the money; in juristic terms, *B* has a simple privilege to decline a tender. This is a case of logical conflict since the same act (i. e., tender of payment) is jurally opposed; privilege being the exact jural negative of claim.

Logical conflict can not exist between two zygnomic relations since the idea of zygnomic relation necessarily implies as one of its qualities not merely the acquiescence but the affirmative support of the law. There would be a fatal contradiction in saying in the same reference that the law supports and that the law does not support the evolution of an act.

**8. Integral conflict.**—Integral conflict occurs without logical opposition. Logical opposition occurs, as above shown, when there is a conflict of jural contraries, negatives, or reciprocals. Integral conflict is a conjunction of jural relations not involving the same content (act) where because of such conjunction the evolution of one relation has a destructive or degenerative effect upon the other.

**9. Uniactive and biactive conflicts.**—Integral conflicts are divisible into two kinds: (a) uniactive and (b) biactive conflicts.

*Uniactive conflict* exists when only one of two opposed jural relations is active and where the other is passive. There are two kinds of uniactive integral conflict: (aa) sanctional conflict, and (bb) non-sanctional conflict.

Where a municipality or a railroad company has a power of eminent domain, it may divest a landowner of his ownership. Here there is an integral conflict of power and claim. But the power, if exercised, is not exercised as a sanction for a previous breach of duty. Therefore, the conflict is a non-sanctional integral conflict. The conflict is uniactive since only the power

relation can operate in this conjunction. The claim of the land-owner has no jural effect upon the power.

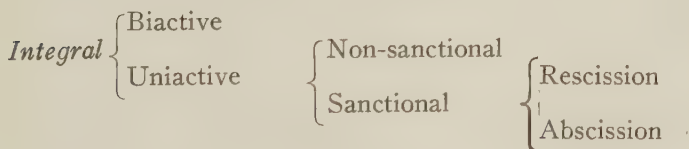
An example of a sanctional conflict is the power of a seller to rescind the title of the buyer for fraud. Here, again, the conflict is uniaactive; the power if exercised destroys the claim, while the claim in no event can have any jural effect on the power. This form is a rescindable sanctional conflict.

Where a creditor has the power to set aside a fraudulent conveyance, there is presented another form of sanctional conflict. This form is abscondable sanctional conflict. Neither grantor nor grantee to a fraudulent conveyance can set it aside, since it is as between them a valid conveyance. Its invalidity is due to the breach of duty to other persons, and they only can attack the conveyance.

*Biactive conflict* occurs when two claims or two powers collide through a two-sided assertion of them. Thus a power of action on a claim barred by limitation is met in direct collision with the power to set up the plea of limitation. Indirect biactive collision is illustrated by the assertion of competing claims or powers as against a third person. The jural effect is comparable to the physical effects of a collision of particles of matter. For jural purposes the jural effects of such collisions in a biactive conflict are (a) neutralization of the conflicting forces resulting in mutual jural destruction of both conflicting elements; (b) destruction of the force of one element; or (c) modification of one element.

The terms and ideas last discussed may be summarized in the following diagram:

#### JURAL CONFLICT



10. **Other terms applicable to jural conflicts.**—There are four other ideas which play a part in an accurate, detailed

juristic statement of jural conflicts. (1) The conflict may exist between the same two persons in the operative complex. Such conflicts may be called 'homadic' conflicts. (2) A third person may be involved in the same conflict as in the case of indirect conflict. These are 'heteradic' conflicts. (3) The conflict may be in two similar basic relations (i. e., two claims, or two powers). These are 'homomorphic' conflicts. (4) The conflict may be between two dissimilar basic relations (i. e., power and claim). These are 'heteromorphic' conflicts.

**11. Homadic integral conflict.**—If a debt is barred by the statute of limitations, the creditor's claim has been reduced by the running of time from a nexal claim to a simple claim. Yet the creditor has a power of suit. The claim is a simple claim, because the protecting power is a simple power, since the protected relation can not have more jural validity than the relation which protects it.<sup>1</sup> If the creditor sues, he may be met by the plea of the statute. Here is integral conflict between the power to sue and the power to defend successfully. The power to sue is a mesonomic relation and the power to defend with effect is a zygnomic relation.

If a loss has occurred under an insurance policy after a breach of condition, the policy is not avoided, but the claim to payment under the policy is a simple claim in the face of the nexal power of the insurer to rescind. The claim to payment is a mesonomic relation and the power to rescind is a zygnomic relation.

In logical conflict of a mesonomic and a zygnomic relation, the mesonomic relation if evolved prevails over the zygnomic relation resulting in its destruction. In integral conflict, the evolution of the zygnomic relation prevails over the mesonomic relation resulting in its destruction. It may also be observed that a claim-duty relation does not submit of direct evolution.

**12. Heteradic integral conflict.**—In this case, the conflict

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<sup>1</sup> But, on the contrary, a mesonomic relation may be protected by a zygnomic relation. For example, a wife's inchoate expectancy of dower (which is a mesonomic relation) is protected by a nexal claim against interference with the expectancy by acts of fraud. If the wife is induced to release her expectancy by fraudulent imposition, she may sue to set it aside.



is neither a logical conflict nor is the conflict a direct one. It is not a case of jural opposition of one person against another person in two relations where each person is respectively dominus and servus. There is, however, a conflict of legal relation in lateral opposition through the existence of the same servus or the same servi in both cases.

This species of conflict arises where there are different persons claiming, respectively, legal and equitable estates or rights; in the tacking of incumbrances; in the application of the doctrine of 'tabula in naufragio'; and in contests among equities equal in degree but different in time.

Thus it is a rule where there are several purchasers or incumbrances each claiming in equity, that the one who succeeds in obtaining an outstanding legal estate not held upon existing trusts will prevail over the others although later in time. Again, a legal estate will prevail over an equity if purchased without notice of the equity. And, again, where the equities are equal the first in time will prevail.

**13. Homomorphic and heteromorphic conflicts.**—In jural conflicts the prevailing phenomenon is that of heteromorphic conflict (i. e., power and claim). This rule, however, is not universal even for uniactive conflicts. For example, the power to revoke a power of agency is uniactive; the agent's power is to bind his principal in jural relations; in that sense it is active; but it is not an active power in a conflictive sense; the exercise of the agent's power in no way affects the principal's power of revocation. There is, however, one group of the four leading groups of jural conflicts where the conflicts, it would seem, are invariably homomorphic; that group is the group of biactive conflicts where the jural collision is always one of claim against claim or of power against power.

In summary, jural conflicts may be of four classes: (1) Logical conflicts; (2) biactive integral conflicts; (3) non-sanctional integral conflicts; and (4) sanctional integral conflicts. The first two are biactive conflicts and the latter two are uniactive conflicts.

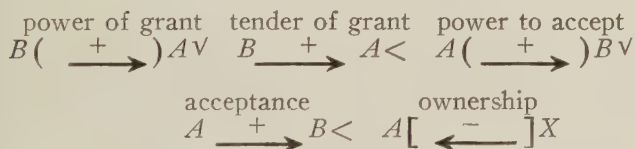


## CHAPTER IX

### PROBLEMS OF JURAL CONFLICT

- |                      |                                 |
|----------------------|---------------------------------|
| 1. Easements.        | 5. Claims barred by limitation. |
| 2. Self-defense.     | 6. Payment.                     |
| 3. Privileged libel. | 7. Privilege.                   |
| 4. Self-crimination. |                                 |

1. **Easements.**—Let us assume that *A* is the owner of Blackacre and that *B* is one of an undifferentiated multitude. *B* owes *A* a duty not to trespass on Blackacre. The duty owed by *B* is a negative duty. The relation between *A* and *B* as to that duty is an unpolarized (in rem) relation since *A*'s becoming owner by grant or otherwise did not point out *B* as necessarily owing that duty. This would still be true even though *B* was *A*'s grantor. The grant is one thing, the acceptance of it is another, and the result of the acceptance is a third thing. This may be accurately shown by a linear graph as follows:



It is seen that while the power to accept and the actual acceptance run against *B*, the resulting legal relation does not identify *B* any more specifically than any other person. So far as the graph shows anything to the contrary, *B* may have died at the same moment when the acceptance was completed.

The preliminary question now is, does *B* (or *X*) owe one duty not to trespass on Blackacre? or, does *B* owe as many duties as there are possible physical divisions of the land in a horizontal or vertical dimension? An affirmative answer to the latter alternative would be at least thinkable but it would hardly be convenient or useful and we have no doubt that for practical pur-

poses there is only one duty owing to *B* not to trespass. Anticipating a question that might be raised, if *A* is also owner of an adjoining tract called Whiteacre deraigned from another source of title, *B* owes a separate duty not to trespass on Whiteacre.

Coming now to our chief problem, suppose that *A*, the owner of Blackacre, grants an easement of way over Blackacre to *B*. Having in mind only the legal relation between *A* and *B*, what is the jural effect of the easement as to *A*'s ownership? More specifically, the question is, what becomes of *A*'s claim against *B* not to trespass? Various solutions suggest themselves.

(1) It may be supposed that *A*'s right against *B* not to trespass is destroyed. The case is one of logical conflict, since the exact jural negative of the claim not to trespass is the privilege to enter the land according to the scope of the easement.

This solution is persuasive, and it probably represents the current view so far as there can be said to be any view of the problem. Yet it is more complex than it appears.

(A) If *A*'s claim against trespasses is destroyed, then clearly it no longer exists. If *C* trespasses on the way (but not in conflict with *B*), *B* can not maintain an action against *C*, since *B* did not acquire the claim previously owned by *A* and now gone out of *A*. If *A* does not have the claim against *C* and *B* does not have it either, then there is no remedy against *C* in favor of anyone. But it may be urged that *A*'s claim against trespass is annihilated only as to *B* and that *A* has the claim against *C* and against other persons since these are separate legal relations.

(B) If and when *B*'s easement ends, what becomes of *A*'s claim against *B*? As to *B*, the claim was destroyed. *B* does not grant it back to *A* since *B* did not have it to grant. Yet, if after the termination of the easement, *A* again owns the claim against *B*, how did *A* get it? It must, of course, be said that one of the jural effects of the termination of *B*'s easement was to invest *A* automatically with a new claim against *B* not to trespass. Juristically, this is a very difficult operation since it requires the creation of a distinct new claim upon the extinction

of another. This feature throws doubt upon the solution under discussion.

(C) If *A*'s claim as to *B* is destroyed within the scope of the easement, then *A* still has a general claim against *B* not to trespass on other parts of Blackacre. The original single duty of *B* not to trespass (a) was wholly destroyed to be replaced by a new duty against *B* not to trespass beyond the easement, leaving the duties of other persons not to trespass (i) intact, or (ii) to be likewise replaced by new duties, or (b) the original single duty of *B* not to trespass was modified only by a reduction of its scope leaving the duties of other persons intact without modification. The complication suggested here is not an objection and no other solution would present less complication. Jural reality can be no simpler than other realities.

(2) It may be supposed that *A*'s claims against trespasses as to all persons are destroyed by the grant of easement to *B* and that new claims against trespasses as to all persons but *B* are created and that when *B*'s easement terminates (i) new claims against trespasses as to all persons including *B* are re-created, or (ii) a new claim against trespass is created as to *B* only. This solution presents anew the chief juristic difficulty of the first solution and it has the additional objection of presenting unnecessary complexity. Moreover, it can probably be shown to be unsound. For example, if *C* commits a continuing trespass antedating and postdating *B*'s easement, two different sets of duties would be in question.

This solution is clearly so unworkable that it will not repay detailed analysis. Other solutions also may be suggested dealing not only with the extinction of duties logically in conflict with *B*'s easement but including all the duties that may be owed to an owner of land. We pass them by as not worth discussion in favor of a third solution which we believe is entitled to preferential support.

(3) We may suppose that the grant of easement by *A* to *B* has not destroyed any of the legal relations of which *A* was



dominus as to *B* or as to other persons. But it will at once be asked, How can it be that *A* has not lost the advantage of any legal relation if he grants an easement to *B*? The answer is, that *A*'s claim against *B* against trespass has not been annihilated but has simply been overshadowed by the grant of easement and overshadowed only according to the scope of the easement and only in favor of *B*. The jural situation may be described figuratively as a partial eclipse of one legal relation by another.

In juristic terms, *A*, after the grant of easement to *B*, has a simple claim against *B* not to trespass. If *A* sues *B* in trespass alleging ownership of Blackacre, *A* will recover unless *B* pleads his easement. *B* has a nexal privilege to pass over Blackacre. The simple claim of *A* (which is a mesonomic relation) is in logical conflict with the nexal privilege of *B* (which is a zygonomic relation). The claim being of inferior jural rank gives way to the privilege which is of superior jural rank. But it must be noticed that while the claim is of inferior jural rank when and so long as the superior privilege is asserted or otherwise appears, the claim is a part of a complex called ownership, and will survive as long as there is any vestige of ownership remaining, while the privilege stands alone as accessory to the complex called ownership. The privilege, therefore, may be extinguished in two separate directions: by extinction of the principal relation, and by extinction of itself as an accessory relation. The claim can not be extinguished without an extinction of the last, the residual, element of ownership. The claim has a permanent quality in contrast with the privilege.

Now it may be asked, that, admitting that this juristic hypothesis is workable, and admitting that it overcomes the objections to the first theory, what advantage may be claimed for it to outweigh the complexity of assuming the coexistence of two legal relations in logical conflict where one when asserted must necessarily give way to the other? The answers follow.

(1) We may for a moment fall back to our figure of the partial eclipse. If the moon happens to be occluded through a temporary conjunction of celestial bodies, we do not say that there is no moon simply because for a limited time it ceases

to be visible. So also we need not say that the claim against trespasses is extinguished as against *B* because of *B*'s easement. The claim of *A* is a relatively permanent quality of ownership while the easement relation is in comparison a temporary obstruction of it.

(2) It is a convenience of thought to be able to regard ownership of an object as a continuous entirety. To say that an owner is owner as to some persons and not as to others is incongruous. It is also incongruous to regard ownership as to some persons, as having no limitations, and as to others as having some parts or qualities cut away. If ownership can differ as to different persons, then there are different kinds of ownership. The theory here proposed keeps all the incidents and qualities intact while making due allowance for the legal interests of others.

(3) The legal interests of others with reference to the object owned are worked out not by making a quantitative deduction from the elements of ownership but by giving these elements a qualitative character to reflect the conflicting rights of others.

(4) There is a procedural advantage in keeping intact all the elements that make normal ownership effective. Accessory legal relations touching the object of ownership must be specifically asserted. The assertion of ownership carries with it a procedural presumption of the absence of conflicting legal relations. This is as it should be, since ownership is the principal (complex) legal relation upon which accessory legal relations must depend. There may be uncertainty of the existence of the accessory legal relations as against the relation of ownership, but the converse is not true.

(5) The theory proposed avoids the juristic legerdmain of supposing the complete destruction of a right and its creation anew by a jural fact with which it is in no way connected. The first theory breaks at this point; it assumes a jural effect without jural causation. The present theory accounts for what happens by making a qualitative distinction between two coincident and conflicting legal relations without assuming, as does

the first theory, that the conflict necessarily destroys the inferior relations. The claim (e. g., against trespass) is not extinguished but is kept intact with a qualitative reduction of jural value, and if and when the accessory relation (e. g., easement) terminates, it regains its original jural value. It should be noticed here that there is actual jural causation in producing this result since it is a case of jural conflict. The two assumed relations are conjunctive and when the conflict is removed by the destruction of the superior relation, the inferior relation again attains its former value by the addition of the same measure of jural force that was lost when the conflict originated. It should also be clearly noticed that by the first theory the claim (against trespass) is assumed to be non-existent while the privilege (of easement) exists, and that the non-existent claim again comes into existence at the moment the privilege ceases to exist. There can be no jural conjunction of an existent legal relation with a non-existent legal relation.

(6) Perhaps the principal advantage that may be asserted for the last theory is that of accuracy of jural accounting. All the jural elements that are necessary to be treated in the problem are properly accounted for. They do not appear, disappear, and reappear, but remain on the record until they are finally eliminated. Account books may of course be kept on the first theory by omitting to enter disbursements and at some other time omitting to enter a corresponding reception of money. The books will balance, but the record will be false and incomplete. That the first theory prevails is due to the tendency to abbreviate complex legal situations into the fewest possible terms. This process more than any other is the cause of countless technical miscarriages in the administration of law.

**2. Self-defense.**—There is a nexal claim of corporal security against persons generally. Therefore the claim is unpolarized at the servient pole. The servus is not juristically identified. Circumstances may give rise to a lawful power of self-defense which may enable the defending person for his protection to invade the corporal integrity of another. Here, again, is an

instance of logical conflict and we are confronted by the same problem already discussed in connection with easements. We have the choice of two predominant competing solutions.

On one hand we may suppose that when the proper circumstances arise, the claim of corporal integrity of *A* is destroyed and that *B* (the defending person) has a privilege to invade the corporal integrity of *A*; and that as the conditions shift (where there is a combat between *A* and *B*) that the claim appears and disappears like the movement of a photographic shutter.

On the other hand, we may assume that *A*'s claim to corporal integrity is never at any moment destroyed, whatever the shift of circumstances, but is occluded for juristic purposes whenever and as often as *B* has a privilege to invade *A*'s corporal integrity. *A* has a simple claim to corporal integrity against *B* and nexal claims to corporal integrity as against all other persons. *B* has as against *A* a nexal privilege to invade his corporal integrity. When the privilege is extinguished, *A*'s claim against *B* again becomes a nexal claim. The claim has a permanent character in contrast with the privilege, and as a matter of juristic mechanics the permanent feature should not be subjected to juristic manipulations beyond the needs of the case.

**3. Privileged libel.**—This is essentially the same problem as those already discussed. *A* has a claim that others shall not impair his reputation. In certain circumstances *B* may harm *A*'s reputation without being liable if he pleads the privilege of his act. The same two solutions are possible and the one to be preferred, when circumstances arise which permit *B* to harm *A*'s reputation, is that *A*'s claim against *B* to unimpaired reputation has not been destroyed but has been reduced in jural value. There is as against *B* a simple claim in *A* and as against *A* a nexal privilege in *B*.

**4. Self-crimination.**—There is in certain circumstances a privilege against self-crimination. The public prosecutor has a claim against persons summoned before courts or grand juries in criminal causes, requiring such persons to give testimony. If *A* is summoned to testify, he owes to *B*, the public prosecutor,

a duty to testify. It may be observed at this point that even if it be assumed that the duty is one owed to the sovereign the juristic problem now under discussion would not be altered although a different procedure of explanation would be necessary. That point is irrelevant here, but we believe the view taken here is the correct one—that the duty is owed to the public prosecutor and not directly to the sovereign.

*A* may decline to incriminate himself if an incriminating question is put by *B*. The problem of this case differs from those already discussed in various ways. The problems above deal in each instance with unpolarized legal relations—the duty not to trespass, the duty not to impair corporal integrity, and the duty not to harm reputation. Those duties are all negative duties and they are cast on persons in general who are not identified by the investitive facts which create the duties.

In the problem now under discussion, the legal relation of claim and duty is such that the persons at each pole are legally identified. The relation therefore is a polarized legal relation. The situation needs to be further analyzed. We shall first proceed from a non-incriminating question. Does *B* have the power against *A* to create a duty in *A* to answer a non-incriminating question? Or is there no legal relation between *A* and *B* until the question is asked?

It would seem that there is a power relation prevenient to the claim relation. But the power relation is unpolarized and contingent; it is also a mesonomic relation. It is unpolarized because *A* is not legally identified as the servus of the power even though *A* has been sworn and has entered the box. A legal relation is polarized or unpolarized at its inception and never at a subsequent time. When *B* became invested with his office his power then arose. The relation is contingent because there is no certainty that *B* will ask any question, even though *A* is in the witness box. The relation is also mesonomic because it does not directly abridge the freedom of *A*.

Assuming now that *B* asks *A* a proper non-incriminating question, *A* immediately falls under a duty to *B* to answer. But assuming that *B* asks a question proper in form, the answer to which will incriminate *A*, does *A* owe *B* a legal duty to answer?



It is said that *A* has a privilege to decline to answer. The term privilege as used here connotes a legal relation; in other words, some constraint on *B*. If *B* meets *A* on the street and asks the same question or any other question, *A* does not have a *privilege* not to answer. He has a liberty or freedom or choice to answer or not. No legal result follows if he does not answer. The failure to answer does not in any legal way affect either *A* or *B*.

If *B* asks *A*, a witness, an incriminating question, on the assumption that *A*'s refusal will not be sanctioned, is the case the same as if *B* had asked *A* the same question on the street? If the case is the same, then *A* did not owe a duty to answer nor did he have a *privilege* not to answer. He simply had liberty, freedom, or choice to answer or not.

But if *B* asks the incriminating question, *A* must answer unless he asserts that the answer will tend to incriminate him. It seems, therefore, that there is compulsion on *A* up to a certain point which is purely contingent. The witness, *A*, may not choose to decline an answer. Since there does appear to be compulsion on the witness which can be overcome only upon a contingency, there can be no doubt that *A*'s claim against *B* is a nomic relation. There can also be no doubt that since *A*'s claim may be effectively obstructed by *B*'s privilege, that the claim relation is mesonomic and that the privilege relation is zygnomic.

As a matter of juristic mechanics, the problem presents the question whether there is only one legal relation between the public prosecutor and the witness or as many legal relations as correspond to the number of questions asked of the witness as witness. We have seen that some questions may be incriminating and other questions may not be incriminating. That fact alone would require classification into two groups of legal relations raised by the questions, but since the prosecutor's claim arises only when he puts a question and since an answer to it is a performance of the duty corresponding to the claim, and since the exercise of the witness's privilege is an effectual obstruction of the claim, we must conclude that there are as many legal relations between the prosecutor and the witness as questions are asked of the witness.

5. **Claims barred by limitation.**—In this case there are two conflicting mesonomic relations dealing with an economic interest. There is a simple claim to have tender of performance and there is a simple privilege to decline to tender performance. There are also two conflicting jural relations dealing with instrumental interests. The creditor has a simple power of suit and the debtor has a nexal power effectually to obstruct the creditor's action. The creditor's power is a mesonomic relation and the debtor's power is a zygnomic relation. The conflict here in both instances is of polarized legal relations.

6. **Payment.**—If *B* owes *A* \$100 and *B* pays \$50 on account, what is the jural situation that follows? There are chiefly two possibilities:

(1) That the payment of \$50 destroyed the claim of \$100 and has created a new claim of \$50.

(2) That the partial payment has not destroyed the claim of \$100 but has modified it.

1. If the claim is a simple debt, the first possibility, which is a theory of novation, is juristically workable, but it would be difficult to quadrate with the actual legal view. It has this justification—the creditor is not under a duty to accept a partial payment, but if he does accept it, he may be said to have consented to a novation. Furthermore, the statute of limitations will start running anew from the date of the partial payment, but that would be true also of a new promise which goes to the whole claim of \$100. If there was a defense to the entire claim and the partial payment of \$50 created a new claim, then it would be difficult to attach that defense to the new claim.

If the claim is evidenced by a specialty, a partial payment is not considered as destroying the legal effect of the specialty, —certainly it does not create a new specialty. Further difficulties would be encountered where the action is by an indorsee against the maker where the maker had made a partial payment before indorsement of a promissory note whether before or after maturity. It would seem, therefore, that the novation theory, while

workable with difficulty for simple debts, can not be adjusted to the law as it stands in the case of specialty debts.

2. Upon the theory that the claim has been modified, it is necessary to ascertain in what manner it has been modified. The answer appears to be a simple one—the \$100 claim has been reduced to a \$50 claim by the partial payment. In no other respect has the claim been altered as to time, polarity, or relation to other legal relations.

There is another possible theory of modification, but it is very complex. It might be assumed that the \$100 claim after the partial payment has been changed into a hybrid mesonomic-zygnomic relation in conflict with a similar zygnomic-mesonomic relation. That is to say that there is a whole substantive claim of \$100 which is a nexal claim to the extent of \$50 and a simple claim to the extent of \$50 standing opposed to a nexal privilege not to pay \$50 and a simple power not to pay \$50. This variation is inadmissible, not because of complexity alone, but because there is a simpler operation and because it is juristically impossible to split an act into two parts having different qualities.

If, therefore, we are compelled to choose the view of simple quantitative modification (i. e., that a \$100 claim has been reduced to a \$50 claim), then the case discussed is not one of logical conflict at all.

7. **Privilege.**—Power and privilege are reciprocal terms. If one in lawful self-defense may inflict a battery on another, the act of self-defense may be considered either as one of power or of privilege. The power is the capability to commit the battery—a positive act. The privilege is the capability to decline the negative act of respecting the other's corporal integrity. Again, if a principal can withdraw his agent's authority, the act of revocation may be considered either as a power or as a privilege. The power is the capability to revoke the agent's authority—a positive act. The privilege is the capability to decline the negative act of leaving intact the agent's authority. Reciprocal powers and privileges are the positives and negatives of the same act. If one is put in positive form, the other must be in negative form.

In the parlance of lawyers, the term privilege is probably confined intuitively to exceptional kinds of power—exceptional in the sense that they arise from special circumstances. Language distinctions, and we mean by language, the words and collections of words used by the people, are never entirely logical. Terminology, however, which is a special language of experts, may be, and tends consciously to be, logical. The term 'privilege' as used by lawyers is used rather in the sense of 'language' than of 'terminology,' and it is probably hopeless to expect to confine the term as actually used, by rigid logical limitations.

It is, however, possible to limit the term privilege in a precise manner. We may confine it to instances where the privilege is in dominant *logical* opposition to a claim without the disapproval of the law. If this distinction could be impressed on the language of the courts, the terms privilege and power would have a scientifically precise and a practically useful function. This distinction, it may be pointed out, is also the one which the idea of 'special circumstances' tends to attain. It may be also pointed out that the term 'immunity' in a similar way may be logically confined to instances of dominant logical opposition to a power without the disapproval of the law, with scientific and practical utility. Some examples of the use of the term 'privilege' will now be given.

A principal has the power to revoke his agent's authority. This is an instance not of logical conflict but of integral conflict. The agent has power to bind his principal and the principal has a power to revoke the agent's powers. The agent does not have a claim that the principal shall not revoke the agent's authority. There is therefore no logical conflict; this is an example of integral conflict.

But if the principal had contracted with the agent not to revoke the agent's authority there would now be a logical conflict—the agent has a claim against the principal that the principal shall not revoke the agent's authority but the principal has the power nevertheless to revoke the agent's authority and if the power is exercised, the law will give effect to it; i. e., the agent's authority will be destroyed. While there is logical conflict, and while the power is dominant, yet the result is not one

approved by the law. Therefore, in neither case do we denominate the principal's power a privilege.

In certain circumstances *A* may enter the land of *B* to abate a nuisance. Here is a conflict of powers and claim—power to invade the land and chattels of *B* and a claim against *A* that he shall not enter. The conflict, clearly enough, is a logical conflict. The claim gives way to the power and the result is not contrary to the law. In this instance, therefore, the term privilege may be substituted for power to give it a special connotation; but it must still be emphasized that it is a power with a special application.

In certain circumstances, a private person may lawfully arrest another. Here again is a conflict of power and claim—the power to arrest and the claim not to be physically molested. The claim gives way to the power and the result is not contrary to the law. This power, by the distinction made, would be a privilege.

The same person may arrest another on suspicion of having committed a misdemeanor. There is the same logical conflict of power to arrest and a claim not to be arrested. The claim again gives way to the power for the simple reason that the power is exercised. But the exercise of this power is disapproved by the law. It is, not, therefore, a privilege.

If an officer arrests a person on reasonable suspicion of having committed an actual felony, there is the same logical conflict of power and claim. The arrest is lawful. By the test proposed, the power here would be a privilege. In this instance it would seem that there is a discordance between the logical distinction as stated and professional usage. But a system of terms is like a roadway; it must run its course even though here and there it may be necessary to cut down a natural obstruction. The particular difficulty here might be avoided by adding a new limitation to distinguish the power of public persons and private persons, designating powers of private persons which are in lawful logical conflict with other legal relations as 'privileges' and all such powers of public persons by the uniform term 'powers.'

It is sometimes said that an owner of land has the 'privilege' of walking on his land. The meaning here is that the owner



does not do an unlawful act. This usage is highly objectionable. The use of the term 'privilege' in the proper sense, i. e., in professional discourse, always implies a legal relation involving the privileged act. When an owner walks on his own land, he does not evolve a legal relation. He simply exercises his liberty. The owner's act has no legal effect whatsoever on any other person.

## CHAPTER X

### FUNCTIONAL MESONOMIC RELATIONS

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| 1. Kinds of relations.                             | 11. (5) Terminal relations.                      |
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| 3. Anomic relations.                               | 13. (7) Regenerable relations.                   |
| 4. Mesonomic relations are intermediate relations. | 14. Other illustrations.                         |
| 5. (1) Introductory legal relations.               | 15. (8) Accrescent relations.                    |
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| 7. (3) Rescindable relations.                      | 17. Is an accrescent relation a jural relation?  |
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| 9. (4) Abscindable relations.                      | 19. (9) Degenerated relations.                   |
| 10. Scope of abscindable relations.                | 20. (10) Decrescent relations.                   |
|  | 21. Summary and classification.                  |

1. **Kinds of relations.**—Relations are *anomic* (non-legal) and *nomic* (legal). Anomic relations need not be further classified here, since they fall entirely outside the law. Each science adopts a similar procedure, dividing the field of reality into what pertains to the science in question and into what lies beyond.

2. **Nomic relations.**—Nomic relations may be divided into two chief groups: *mesonomic* and *zygnomic*. This division is an important one and necessarily is dealt with, whether articulately or not, in all departments of the law.

3. **Anomic relations.**—For the purpose of explanation we shall begin with anomic relations.

1. If *A*, residing at *x*, acts in such a way as to affect *B*, residing at *y*, the relation of *A* and *B* may be anomic or nomic. Suppose that *A* has published a book in which he says (as Wells has said) that Napoleon was “a scoundrel, bright and complete,” and that *B*, a Napoleonist reads the book and is greatly enraged.

Here, what *A* has written and caused to be printed and circulated, affects *B*, but the relation of *A* and *B*, as to *A*'s act, is anomic, since the law will not in any way act upon it or its probable consequences.

If *B* should conceive that he has a cause of action on the facts stated, and should begin an action which would result in a *nil capiat*, a non-suit, or its equivalent, this result shows the application of a legal rule and the existence of a legal relation at the point where the rule was applied. The applicable rule of law is one of the most general rules which can be found. Stated in imperative form, this general rule is, first, a command to all persons subject to the law not to present to the state's tribunals matters which are not justiciable, under pain of nullity of action; secondly, it is a command to the officers of the state to bring about that result (nullity) in such cases.<sup>1</sup>

Anomic relations between two human beings are classifiable into all the categories of logic, of jurisprudence, and of many of the categories of science. Thus, *A* and *B* may be in gravitational relation, in chemical relation, in psychic relation, in relation in space, in time, etc. But precisely because they are anomic relations, they can not be legal existents, and they, therefore, demand no attention for terminology or classification (other than a general term such as proposed.)<sup>2</sup>

Of anomic relations, some are of such a nature that they may be raised to nomic relations if the state chooses so to do. For example, various relations which are merely moral, esthetic, or economic might be transmuted into legal relations. Others again, are of such a nature that it would not merely be unwise to attempt to change them into legal relations, but that it would be practically impossible. Lastly, other relations can never be trans-

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<sup>1</sup> "When the physical event that we are predicting is the conduct of a state agent, executive or judicial, acting for society, the rule we are applying is called a rule of law; and with respect to the expected action of societal agents, our relations to our fellow men are commonly called legal (or jural) relations: Prof. *Arthur L. Corbin* in *Yale L. Jour.*, 30: 226 (227): "Jural Relations and Their Classification."

<sup>2</sup> But in a classification of duties it is desirable to include immunity from unjust litigation whether meritorious or not. Cf. *Smith v. Mich. Buggy Co.* (1898) 175 Ill. 619.

formed into legal relations; for example<sup>3</sup> the relation of an object to another object.

But every legal relation must have a *material* basis. It consists of a situation of material fact and of legal fact—of what may be perceived objectively, and of what is purely conceptual. Even the notion of the state, of law, or of sovereignty, involves this double aspect—an objective side and a conceptual side.

**4. Mesonomic relations are intermediate relations.**—Mesonomic relations, as the name itself indicates, are a middle stage between a lower (anomic) and a higher (zygnomic) group of relations. They are quasi jural. As we have already stated, this category of relations is very important in legal reasoning. For technical purposes, it is even more important than the category of (zygnomic) relations and its existence can not be ignored. It includes the following types:

#### A. KINDS OF FUNCTIONAL MESONOMIC RELATIONS

**5. (1) Introductory legal relations.**—Zygnomic relations often are preceded by one or more preliminary mesonomic relations. It is desirable to distinguish those introductory relations which are parts of a chain in a normal concatenation from those which produce an abnormal concatenation. Of the first sort are chiefly those which result in contract relations. *A* has a power to make an offer to *B*. He may never make the offer, but he has the power to make it, nevertheless. This power of offer is a legal relation, since, if it is put in motion, a legal consequence follows. The power relation is mesonomic because, while being a legal relation it does not involve an immediate physical constraint of freedom. It is purely a preparatory stage

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<sup>3</sup> One of the chief reasons why certain interests remain unprotected is that they have not become sufficiently standardized as social needs. Material interests here will always fare better than mental interests. The law in all directions is tending to extend the scope of economic interests (e. g., the notable growth of unfair trade legislation) but extensions of interests of personality make their way with great difficulty (e. g., the various interests of privacy). Reasons of policy also have an important bearing on these questions to protect one class of interests and to leave others to autonomous protection by extra-legal social constraints.

for the contingent eventuality of a legal relation which works a physical constraint of freedom.

To proceed with the illustration, if an offer is made by *A* to *B* then *B* will have a power to accept the offer. This also, and more apparently, is a legal relation. But it is not yet that kind of legal relation which directly works a physical constraint either statically or dynamically; that is to say, either as a relation or after evolution. *B* having the power to accept may perhaps not exercise it. Unexercised, the power of acceptance leaves a constraining relation in the realm of pure contingency. On the other hand, if *B* exercises his power to accept, in apt time, the immediate jural effect of the acceptance is not a physical but a legal event which creates a constraining legal relation. The acceptance, in a word, is not a contract, but is merely the operative fact which the law finds sufficient to create a contract. The power of acceptance, therefore, is an introductory legal relation and it is also a mesonomic relation. It is in no way distinguishable from the power to offer except in that by evolution (i. e., the act of acceptance) it directly creates with the approval of the law a zygonomic relation. To indicate that distinction, this type of mesonomic relation may be denominated a prozygonomic relation.

6. (2) **Unlawful relations.**—What Hohfeld called “linguistic contamination” makes it difficult to assimilate readily the idea of an unlawful relation as a *legal* relation. The difficulty, however, is not insuperable and perhaps does not need explanation. In the illustrations dealing with offer and acceptance, we dealt with normal concatenations of legal relations. We now proceed to deal with abnormal concatenations. These abnormal jural sequences are plentifully illustrated in the law of breach of contract, tort, and crime.

If *A* commits a tort, he has produced a *legal* result in the sense that consequences follow which the law will act upon. The person injured gets a claim to damages which the law fortifies by a power of action. The tort act was an unlawful act, but it was also a legal act, since the legal relation that follows could not be a *legal* relation unless the cause of it was a *legal*



cause. The cause, if it was an act (and it was an act), necessarily must have been the content of a legal relation. Therefore, the legal relation leading up to the tort was an unlawful relation and the evolution of that unlawful relation was an unlawful legal act. So much for the matter of linguistic contamination.

The tort act produces a zygnomic relation. The power to commit the tort which is (as we have seen) a legal relation is not a zygnomic relation. Its evolution works an immediate physical constraint but that constraint is one which the law disapproves as against the tortfeasor. The law's disapproval is manifested by the creation of an automatic sanction of an immediate duty to pay damages for the harm done. The power to commit the tort, therefore, is a mesonomic relation. Like offers and acceptances, unlawful relations are preliminary relations. This follows for the reason that an unlawful zygnomic relation is a juristic contradiction of terms. The law never permits with its approval an unlawful constraint of the physical freedom of another. 'Approval' and 'unlawful' are irreconcilable.<sup>4</sup>

7. (3) **Rescindable relations.**—A rescindable relation is that kind of a legal relation which, while uniform in legal incidence, in other respects as to all persons, is subject to a power in one person to bring it to an end against the will of the person who is to be divested or of the person who is to be invested with the right. Where there is conflict between the power to rescind and the relation to be rescinded, the rescindable relation is mesonomic.

Thus, if *A* by fraud procures goods from *B* under a contract

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<sup>4</sup> There are possible cases where an act done with the object of creating a legal relation may be an unlawful act and bear a penal sanction and where the projected legal relation may still be permitted to come into existence. Cujacius gives a definition and example: "Minus quam perfecta lex est, quae vetat aliquid fieri, et si factum sit, non rescindit, sed poenam iniungit ei, qui contra legem fecit; qualis est lex Furia testamentaria" (A. U. C. 571) which forbade the acceptance of a greater legacy than 1000 asses and imposed a fourfold penalty. In this case, the *act* of acceptance of the legacy is unlawful but the ensuing *relation* of ownership of the legacy is lawful and as such has the law's approval. The law's disapproval of the *act* is manifested by the imposition of a penal sanction.

of sale, *A* is owner of the goods as to all persons without exception, even including *B* who has been defrauded, but *B* has power to rescind the sale if he exercises his power in apt time. Until *B* rescinds, *A* remains owner as against all persons, including *B*. For example, *B* might convert the goods, before, and not by way of, rescission, and make himself liable to *A* for their value. If he later rescinded, that act would not destroy *A*'s cause of action but would affect the measure of damages. That legal result indicates not only a sound instinct to preserve order in the state, but the necessity of keeping a strict account of all legal relations once created for the attainment of the objects of the law. The same instinct accounts for the rule that permits an action for an inadvertent trespass where no actual economic loss can be shown.

In the illustration above given, the ownership of *A* is in conflict with the power of *B* to bring *A*'s ownership to an end. Here, clearly, the power relation is the dominant relation and the ownership relation as against *B* only (since no other person has the power to determine it) is an inferior relation. It is, therefore, a mesonomic relation as against *B* and a zygomic relation as against all other persons.

**8. Further illustrations of rescindable relations.**—If title to goods has passed to a buyer subject to inspection, the buyer may rescind if the goods do not answer the description under which they are sold. Until rescission, the buyer is owner of the goods as against all persons. Here, it will be observed, the owner of the goods has the power to throw back the ownership of the goods to the seller. There is no more of conflict in ownership with the power to divest oneself of the ownership than in the case of an owner's power to abandon the chattel and thereby cease to be owner. The relation of ownership clearly is a zygomic relation. In a wide sense, there is here also a rescission of one's own title. That wide use of the term 'rescission' would include also abandonment of title. The only difference is that where a buyer rescinds his ownership he casts the ownership upon another against the other's will, while in abandonment the owner simply ceases to be owner without any other person

becoming owner as the immediate result of the act of abandonment. But if the buyer owes an executory performance of payment to the seller, that relation is 'rescinded' in the narrow use of the term, and that relation (duty of payment) also is a mesonomic relation because it is jurally opposed by the power to bring it to an end.

If an infant makes a grant of land, the grant is effective as to all persons without exception, but the infant has a power to 'disaffirm' which is simply another term for 'rescind'; i. e., to bring a legal relation of which another is dominus, to an end. The relation of ownership of the grantee is a mesonomic relation as against the infant who has the nexal power of rescission. It is a zygnomic relation as against all other persons.

The term 'rescission' in the narrow sense does not include legal relations not arising out of a chain of jural facts involving the same persons. To illustrate: an insurance company's acceptance of an application for insurance creates an indemnity relation with the insured. If there was a fraudulent representation made by the insured when effecting the insurance contract, there was created with the contract a conflicting power to cancel it for the fraud. This power is properly a power of 'rescission' even in the narrow sense. The same jural fact created both relations. The fraud was in the offer, it is true, but there was no power to act upon that fraud until the contract was created. On the other hand, if *A* creates a trust in *B* and by the same instrument gives a power of appointment to *C*, there is jural conflict as between *B* and *C*, and *B*'s ownership as against *C* is an inferior legal relation because of the conflict. But if *C* exercises his power of appointment, he does not, in the narrow sense already noted, 'rescind' *B*'s title, because there was not a jural chain of facts involving *B* and *C* before the respective relations, of ownership and power of appointment, came into existence. The two relations were created by the same physical act of *A* and there were no preliminary legal relations between *B* and *C* leading to their respective legal positions. By the test proposed for the narrow sense of the term 'rescission,' therefore, the power of appointment is not properly a power of 'rescission,' but since it is desirable to use terms that combine as many

common features as possible, we think it preferable to use 'rescission' for all instances where one person may cut down a legal relation as against another definite person by his own independent act, leaving the varieties of rescission to be separated as may seem necessary for the convenience of professional speech.

By the test proposed, the somewhat puzzling instance of the buyer's rescission of his own title is readily classified as a power of rescission. That solution, moreover, agrees with the usages of professional speech. But while the buyer's power to rescind his own ownership may conveniently be classified as a rescissory power, yet it must be observed (since we are attempting to isolate the various types of mesonomic relations) that the power of rescission in this case is a simple power but that the buyer's ownership is a zygemonic relation. The buyer's power to rescind and his claim of ownership are not in conflict because there can be no jural conflict as to relations having the same dominus.

By the same test, the widest sense of rescission, to include abandonment of a right, is excluded. It is of essence that a rescissory power be adversarial. It is clear that one may not be an adversary to himself or sustain a legal relation to himself. There is nothing adversarial in a power of abandonment. These relations are treated hereafter as 'terminal' relations. The power of appointment is rescissive as to the present holder of the title, and it is inceptive as to the appointee of the power. This example, therefore, presents a double aspect, but juristically there are two powers which must be exercised simultaneously.

9. (4) **Abscindable relations.**—Abscindable relations are transpositive forms of rescindable relations. A rescindable relation is uniform in legal incidence as to all persons but one. An abscindable relation is also uniform in legal incidence as to all persons but one. Where a rescindable relation is found, there is one person who may lawfully destroy the rescindable relation while others do not have that power. Where an abscindable relation exists, one definite person may not lawfully destroy the relation but others in various contingencies may lawfully destroy the relation.

A chattel mortgage, though not recorded as required by

statute, is still valid between the parties, but a creditor by levy may lawfully destroy the mortgage relation. An agreement for a non-possessory lien, though valid between the parties, is defeated by an attachment. Sale of a chattel by the ostensible owner destroys the owner's claim of ownership. Conveyance by a trustee in breach of trust to an innocent purchaser for value destroys such claim as the beneficiary may have had with respect to the trust res.

In all of these instances, there is one person who may not lawfully destroy the relation. That one person lacks lawful power to destroy the relation. Thus, a factor intrusted with goods under express directions first to communicate offers to the owner, has the power to violate his duty; he may effectively sell the goods in breach of his duty. The buyer, however, has the lawful power to take title and to divest the original owner. So, also, a seller in possession may not lawfully sell to an innocent third person, but he may do so unlawfully. The act of the seller is unlawful, but the act of the third person buyer is lawful.

**10. Scope of abscondable relations.**—Abscondable relations have a wide field of operation where the rule of innocent purchaser for value without notice obtains. In general, abscondability results because of special investitive facts, such as taking title innocently, making an attachment or levy, where a general rule as to recording or possession has not been observed, or where the policy of the law favors free alienation. These special investitive facts may be true of all persons whatsoever except one person or a group of persons sustaining a polarized relation to him whose legal relation (i. e., of which he was dominus) is destroyed. Thus, any person contingently may become the holder in due course of a promissory note subject to defenses against the payee, but the power to 'abscond' the maker's power of defense does not arise until such person exercises his power to do the acts necessary to make him an innocent holder in due course.

The special field of operation of abscondability may be shown by contrast of what is not abscondability. Any person may con-



vert the chattel of another, but this is not abscindability for two reasons: (a) the power is unlawful, and (b) there is no separation of one and all. Again, any person may invade the corporal integrity of another in lawful self-defense. Here, also, there is no abscindability in the technical juristic sense. The power is lawful (meeting one of the tests); but there is no separation of one and all (any person has the power of self-defense either contingently or actually). If it be asserted to the contrary that the illustration of self-defense does involve a separation of one (the one defending) and all (the others not in a position to defend because of the absence of special investigative facts) the argument simply tends to show rescindability, but it does not seem convenient to extend the idea of rescindability to self-renewing rights. A title divested does not automatically reinvest itself in the same dominus, but corporal integrity, reputation, and separate rights making up the sum total of ownership, renew themselves.

11. (5) **Terminal relations.**—We have seen that there are two kinds of inceptive legal relations. The first group is based on lawful powers; for example, the simple power to occupy a 'fera natura' or an abandoned chattel. The second group is based on unlawful powers; for example, the simple power to commit a tort. Inceptive legal relations create other legal relations whether mesonomic or zygnomic. Inceptive relations are the starting point of a new chain of legal relations.

A contrary operation is produced by terminal relations; they end an existing chain of legal relations; but in both instances a zygnomic relation is the point of final reference. Inceptive relations go no farther than zygnomic relations and terminal relations start from zygnomic relations.

The jural series of offer followed by acceptance ends in a zygnomic relation (a contract, ownership, etc.). On the other hand, the series consisting of tender of payment of a debt followed by acceptance of the tender extinguishes the debt relation. The acts of tender and acceptance of tender are the content of terminal legal relations. They are the steps by which the zygnomic relation is brought to an end. To illustrate again

by a simpler series of relations,—the simple power to occupy a 'res nullius' is inceptive of the zygnomic relation of ownership and the latter relation may be brought to an end by the simple power of abandonment. When the chattel is abandoned the destruction of ownership is not necessarily followed by a new ownership. If ownership follows in another (or the same person) it is only by means of a new chain of relations starting with the inceptive relation of the power to occupy. Agreements of release also are terminal relations.

12. (6) **Intercalary relations.**—We have heretofore considered types of mesonomic relations which, starting from an anomic background, give rise by inception to zygnomic relations. We have also considered types of mesonomic relations which operate in the contrary direction and terminate zygnomic relations.

(A) *Abnormal intercalation.* In the first place it is to be noticed that there are mesonomic relations which operate to bring one zygnomic relation to an end, and, at the same instant, to create a new zygnomic relation. Tortious destruction of a chattel illustrates this point. The zygnomic relation of ownership is destroyed by the tort and immediately a new zygnomic relation requiring the payment of damages is automatically substituted. In a wide sense, the simple power to commit the tort is an intercalary relation in a connected historical series of relations, but since the concatenation is an abnormal one because of tort intercalation, it is preferable as a matter of classification to put such instances into a separate group as has been done in this arrangement of mesonomic relations.

(B) *Normal intercalation.* In the second place it is to be noticed that there are various ways in which one zygnomic relation is brought to an end by the intervention of a mesonomic relation to be followed by another zygnomic relation without an unlawful element. There are other instances where a given zygnomic relation is affected by the evolution of a mesonomic relation without destruction of the zygnomic relation.

Where a novation occurs, one zygnomic relation is replaced by another zygnomic relation, but with a change of persona on one side. This legal result is accomplished entirely by means of intercalary mesonomic relations. Where a so-called assignment is made (we say 'so-called' advisedly because it is impossible to assign any legal relation) the effect is comparable to that of novation. In the one case, there is novation of a debt (i. e., a new debtor is substituted); in the other case, there is novation of a new creditor or owner (i. e., a new creditor or owner is substituted). The practical difference between these instances is that it is unfair to a creditor to permit a novation unless he consents to it, while ordinarily it is of little consequence to a debtor to whom he makes a performance. Where an assignment of a debt or ownership of an object is effected one zygnomic relation (e. g., as by sale) is substituted for another and this legal result is produced entirely by intercalary mesonomic relations.

(C) *Alterative relations.* A zygnomic relation may be altered in various ways without either (a) destroying it or (b) changing its zygnomic character. This effect may be produced by mutual consent to change the content of the relation in question. It is difficult, if not impossible, to set any juristic limits to the extent of alteration to which the content of a given relation submits either by one act of alteration, or, more difficult yet to measure, a series of progressive alterations effected by mutual consent. The jural effect of alteration may also be produced by partial payments, progressive performances, and successive performances. A given legal relation, as it appears, may also be formally altered by the equitable remedy of reformation.

13. (7) **Regenerable relations.**—These are mesonomic relations which are convertible into zygnomic relations by means of a jural act or event. They include the whole field of inchoate rights. It must be closely observed that in this instance we are not dealing with mesonomic relations which have the function of creating other legal relations (inceptive relations).

Regenerable relations are such as may be fortified in their

jural quality by the intervention of a jural act or event.<sup>5</sup> Thus, the executory promise of an infant is unenforceable unless the infant affirms his promise after attaining majority. The promise is ineffective to accomplish a constraint of the infant unless the contingency is met. The simple act of affirmance after majority standing alone would not operate to create an enforceable legal relation unless it was based on a substrate having at least a minimum of jural vitality. Again, if *A* dealing in the name of *P* with *T* makes a promise purporting to bind *P* (assuming that *A* did not have power to bind *P*) the promise is ineffective as against *P*, but there is a legal substrate which may be fortified by *P*'s act of ratification. The act of ratification is not in terms a promise, nor would it standing alone have any legal effect as a promise; but, attached to the substrate of the actual though unempowered promise of the ostensible agent, it transforms the unenforceable promise relation into an enforceable promise relation. A further proof that the substrate was a legal relation is the fact that the effect of the ratification is to relate back to the promise. The underlying legal relation is regenerated.

**14. Other illustrations.**—Execution of a memorandum will fortify or regenerate a claim unenforceable because of the statute of frauds. In cases involving the statute of frauds, there may be an enforceable claim on one side and an unenforceable claim on the other side of a binary relation; that is to say, the signer of the memorandum may be bound while the other party to the bargain may not be bound.

The operation of regeneration may be shown by a contrast with jural processes which only resemble regeneration. When a claim is barred by the statute of limitations, it is commonly supposed that after the bar of the statute has attached, a new promise 'revives' the old claim. Without going into the detail of what may be said on this difficult question, it is impossible to conceive of a claim once destroyed by breach being 'revived'

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<sup>5</sup> The term 'regeneration' as used here and elsewhere does not imply necessarily a precedent degeneration, but it includes that case. The meaning intended is that a legal relation may be renewed with jural force or fortified (i. e., raised to a higher juristic level) and not that the relation is recreated.

or regenerated by a new promise. The sanctional claim to damages may theoretically be revived, since by the running of the statute it has been reduced from a zygnomic relation to a mesonomic relation, as has also the accessory power of suit. But unless a new promise operates in the same manner as ratification, there is an unsurmountable difficulty in finding legal consideration. The only escape is (a) to regard a new promise not as a promise but as a regenerative jural act which by unilateral operation transforms the sanctional claim to its previous legal condition (before the statute had run) of a nexal claim; or (b) to consider the transaction as one of novation where the debtor enters into a new nexal promissory relation in exchange for the simple sanctional claim. If the first view is accepted, the jural operation is strictly regeneration; if the second view is accepted, the jural operation is novation and the operative relations bringing about the novation are intercalary.<sup>6</sup>

Adoption of a transaction not binding on the adopter, as, for example, where a corporation comes into legal existence after the transaction adopted, resembles ratification but the legal effects are different and the jural operation is likewise different. Adoption, unlike ratification, does not relate back to include collateral legal effects attaching to the transaction (e. g., notice to the adopter of what the ostensible representative knew or was chargeable with knowing) but operates only from the time of adoption. The jural operation is, therefore, not regeneration; there was no legal substrate to be regenerated. In the illustration put, the corporation at the time of the supposed transaction was not in existence and consequently there could be no legal relation in existence that had for one of its jural poles the corporation either as dominus or servus. But it would not be otherwise if the persona already existed, if the case is strictly one of adoption and not ratification. Thus, if *A* enters into a contract with *T*, there is no present legal relation of any kind between *P* and *T* as to that contract. *P* can not ratify it, but by the process of offer and acceptance, *P* may adopt the bargain.

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<sup>6</sup> For a detailed discussion of these questions see *Kocourek* "Moral Consideration and the Statute of Limitations" (1924) *Illinois L. Rev.* 18:538.



The jural process, therefore, is not regeneration but is normal inception.<sup>7</sup>

15. (8) **Accrescent relations.**—Regenerable relations were defined as those legal relations which could be fortified by a jural act or event. Accrescent relations are those legal relations which become zygnomic relations by the flow of time. Ordinarily legal relations are created, modified, or destroyed abruptly; that is to say, by acts or events. The acceptance of a contractual offer creates a contract relation; performance destroys an obligation; death of a promisor destroys a contract for personal services. Other legal relations are created not abruptly but by the flow of time or are destroyed (become decrescent) by the flow of time. The power of suit on a claim becomes decrescent with the running of the statute of limitations; an owner out of possession of an object may by the passage of time cease to be owner, while perhaps another person in an equivalent or longer period of time becomes owner of the same object. In the last example, decrescence and accrescence are, or may be, equivalent.

16. **Jural nature of accrescence and decrescence.**—In some jurisdictions, six years' adverse possession of a chattel operates to destroy the ownership in one and to create ownership in another. Here the period of decrescence and accrescence is equivalent. It may be noted here that the periods of decrescence and accrescence where they may coincide as in the loss and acquisition of ownership of objects need not necessarily be equivalent. The period of accrescence may be longer than that of decrescence, either by special rule of law or because of the facts. If, for example, successive adverse possessors can not tack the previous possessions, the periods of decrescence and accrescence are not equivalent in length of time but are equivalent in occurrence of time. It may also be noted that the legal effects of both may be different. Decrescence may or may not affect ownership of an object while the remedy is affected.

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<sup>7</sup> What is here discussed as 'regeneration' has been extensively treated in continental juristic literature as 'convalescence of rights': Cf. *Windscheid* "Pand." (9th ed.) I, p. 437, § 83.

In some jurisdictions, six years' adverse possession of a chattel does not destroy ownership of the dispossessed owner, but his power of suit has become a simple power; it is subject to be effectively opposed by the plea of the statute of limitations. If the same owner sues again, he may now be met by a plea of *res judicata*, but in legal theory he still remains owner as against all the world with no present lawful power of suit against anyone. If the same chattel should come to the possession of another adverse possessor, the owner's power of suit would be recreated, not by way of regeneration but by inception. If the same chattel later came to the possession of the original owner without fraud, his ownership would then be fortified by complete procedural remedies. Until that time, the dispossessed owner is only in mesonomic relation with respect to the chattel.

Accrescence was formerly held to have a double aspect, but in contrary fashion. The accrescent relation might be defensive only and not offensive. The adverse possessor after the prescriptive period could not maintain, for example, a suit to quiet title, but he might defend his possession in ejectment.

**17. Is an accrescent relation a jural relation?**—No extent of preparation leading to an offer, an acceptance, the making of a grant, or the execution of a will has any legal effect short of the culminating fact. If an offer is in the process of utterance but is still incomplete as an offer, there is manifestly no offer and consequently no legal relation has been created. Is it the same with the operation of time where a zygomic relation does not arise or cease until the last moment of time has elapsed? As to the destruction of legal relations there is one answer, and as to the creation of legal relations by the flow of time there is another. A legal relation does not become decrescient until the last moment of time fixed for its decrescence. The owner of land is still owner even though all but the last day of the prescriptive period has run in favor of an adverse possessor. In juristic terms, the relation is zygomic until the moment that it becomes mesonomic.

Accrescent relations, on the other hand, do not abruptly become zygomic relations but are preceded by a preparatory stage

having certain demonstrable legal effects. The adverse possessor of land may make a conveyance with a covenant of warranty which is available to the grantee's assigns although when the possession of the grantor was not sufficient to work a disseizin. The possessor also may have a writ of entry or trespass against a third person. The adverse possessor of a chattel may maintain trespass against another trespassing against him. These relations, however, are not accrescent relations but arise abruptly after the fact of adverse possession coupled with a subsequent tortious act of a third person. They are also zygomic relations. As against every person except the true owner, the adverse possessor in general stands as owner by the mere fact of his possession.

The question still remains whether as against the true owner the adverse possessor is dominus of a mesonomic relation or whether there is a mesonomic relation as to other persons. It is difficult to see how the adverse possessor can be a simple owner (i. e., by mesonomic relation) where the hypothesis admits a true owner (in zygomic relation). On the other hand, it is also difficult to conceive of a legal situation where there are admitted legal relations as to all persons but one. At any rate, the juristic peculiarity of the proposition arouses curiosity.

**18. Illustrations of accrescent relations.**—Where a bailee sued by his bailor may set up a 'jus tertii' (i. e., of the true owner) the bailee invokes the legal relation between the bailor and the true owner for his defense. What this illustration tends to prove is that the adverse possessor stands in a legal relation to the true owner as dominus of a mesonomic relation which remains unaffected if the defense of 'jus tertii' is not pleaded, even though the fact otherwise appears on the record. The case seems to be different from a defense of payment which, though not pleaded, will prevent the plaintiff from obtaining an unappealable judgment if the fact appears on the record. But a clearer demonstration of legal effects attaching to a supposed mesonomic relation in the case of adverse possession is accretions to land and fruits of chattels arising between the beginning and ending of the prescriptive period. When the accrescent relation becomes mature

(i. e., when it reaches the zygnomic stage) accretions and fruits go with the principal object. This appears to indicate that the period of accrescence has legal effects in that a legal result is produced which is not explainable directly by prescription of rights. Moreover, if the legal effect of legal relationship has been successfully shown, there is no theoretical difficulty in supposing ownership based on a mesonomic relation in jural conflict with ownership based on a zygnomic relation, since in case of actual juridical collision of these two opposed relations, the inferior one always gives way. Lastly, there is also the convenience of juristic reasoning in being able to account for the complete legal ownership attained by the running of the prescriptive period by attributing to the preparatory period a legal significance in terms of relation.

19. (9) **Degenerated relations.**—Degenerable relations are those which may be reduced to a lower juristic level (i. e., without destruction, i. e., from a zygnomic level to a mesonomic level). Degeneration is the contrary of regeneration. In regeneration, a mesonomic relation is transformed into a zygnomic relation. In degeneration a zygnomic relation is transformed into a mesonomic relation. In order to distinguish other varieties of mesonomic relations, both processes (viz., regeneration and degeneration) are limited to acts or events other than the flow of time.

Degeneration may arise by the existence of logical jural conflict. If a legal relation degenerates, it is commonly because another legal relation stands in logical conflict with it. When a claim is barred by the statute of limitations, the power to sue effectually is jurally opposed by a power to defeat the action by pleading the statute. The controlling power is a nexal power and the weaker power is a simple power. The power to sue, therefore, is a mesonomic relation and the power to defeat the action is a zygnomic relation. Other illustrations of degenerable relations are ownership as affected by powers in other persons to enter on land by way of temporary right (e. g., so-called right of deviation), license, or for a special lawful purpose (e. g., to abate a nuisance); corporal integrity as

affected by the power of self-defense or arrest by a public officer; reputation as affected by the power of privileged libel.

**20. (10) Decrescent relations.**—As there are mesonomic relations which are changed into zygnomic relations with the flow of time, so there are also zygnomic relations which are transformed into mesonomic relations by the flow of time. Mesonomic relations of the first type are accrescent relations; mesonomic relations of the latter type are decrescent (or senescent) relations.

We have already seen that a claim barred by limitation is a decrescent claim as is also the accompanying power of suit. Upon the legal theory that the barred claim may be 'revived,' it is clearly before revival a mesonomic relation. But even upon the theory of novation to explain the jural effect of a new promise or acknowledgment, this claim is still for some purposes a legal relation (i. e., a mesonomic relation). It may be enforced on the contingency that the power of defense is not put in motion. It may also under certain conditions be enforced as a set-off.

The promise of a bankrupt to pay a debt discharged by bankruptcy 'revives' the debt, but this instance is not one of decrescence, since the debt was reduced from a zygnomic to a mesonomic level not by the flow of time but by an official act (i. e., the order of discharge). That instance, therefore, is one of degeneration, and the new promise is regenerative.

**21. Summary and classification.**—In the foregoing enumeration of ten varieties of mesonomic relations, various important functions were found to be served by this type of jural relation, as follows: (a) Creation of zygnomic relations; (b) destruction of zygnomic relations; (c) intercalation and alteration of zygnomic relations. These jural results are accomplished in various ways as follows:

(a) The creative function is accomplished (i) by lawful or unlawful relations of a preliminary nature. This may be called the 'inceptive' function and the mesonomic relations are



*inceptive* relations. Creation may also result (ii) from regenerative acts or events or by the flow of time (accrescence). These are *reflective* relations.

(b) The destructive function is accomplished (i) by rescission or by abscission. Rescission operates by way of a polarized power (i. e., the dominus of the power is jurally identified). Abscission operates by way of an unpolarized power (i. e., a power of which the dominus is not jurally identified) which is altered by way of regeneration into a polarized power (i. e., a power of which the dominus is jurally identified).<sup>8</sup> These two forms of jural destruction are *scindable* relations. (ii) Destruction may also operate partially by changing a zygnomic relation into a mesonomic relation. This modal destruction may result from acts or events (degeneration) or from the flow of time (decescence). These two forms of jural destruction result in *reductive* relations. (iii) There is still a third form of destruction which is accomplished by *terminal* relations.

(c) Intercalation has two forms: (i) It unites the creative and destructive functions; creating in one something at the same moment that something is destroyed in another. Legal relations can not be conveyed even though by the intercalary act it may be supposed that what is created in one is the exact equivalent of what is destroyed in another. This form of intercalation is *substitutional intercalation*. (ii) Intercalation may

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<sup>8</sup> The last statement, because of its juristic difficulty, may need a word of explanation. Any person without notice of a trust may deal with a trustee, and, by paying value, may destroy the trust relation as to a particular res. But until a person actually enters into such a transaction and takes the res, the destruction of the trust is contingent. Nevertheless, there is already a legal relation in favor of undefined (unpolarized) persons. These contingent relations are mesonomic relations and standing in jural opposition to the cestui's claim are overborne by the cestui's superior legal position; but when a definite person innocently bargains to take the res, the mesonomic relation becomes regenerated into a polarized relation of power to destroy the trust so far as concerns the res to be conveyed. The regenerated and now polarized power stands in jural opposition to the cestui's claim and is superior to it. What the innocent intervenor has gained in jural force, the cestui has lost. The power is a nexal power and the claim which it opposes is a simple claim. Before the regenerative fact the cestui's claim was a nexal claim and the third person's contingent power was a simple power.

also operate on a jural relation without changing its jural character or without destroying it. This is *alterative intercalation*.

These various ideas, necessarily abstract in the unfoldment, and perhaps somewhat difficult because of the unavoidable task of supplying a terminology, may be readily understood in a synthetic arrangement.

#### B. TABLE OF FUNCTIONAL MESONOMIC RELATIONS

CREATIVE	{ <i>Inceptive</i>  <i>Refective</i>	{Introductory (lawful acts)
		{Introductory (unlawful acts)
INTERCALARY	{ <i>Substitutional</i> <i>Alterative</i>	{Regenerable
		{Accrescent
DESTRUCTIVE	{ <i>Scindable</i>	{Rescindable
		{Abscindable
	{ <i>Reductive</i> <i>Terminal</i>	{Degenerable
		{Decrescent



## CHAPTER XI

### DESCRIPTIVE MESONOMIC RELATIONS

- |   |                                       |
|---|---------------------------------------|
| 1. Two leading kinds of meso-<br>nomic relations. | 9. Homadic conflict—illustrations.    |
| 2. Sovereign relations.                           | 10. Heteradic conflict—illustrations. |
| 3. Contingency relations.                         | 11. Plurinary integral conflicts.     |
| 4. Conditioning relations.                        | 12. Suspended relations.              |
| 5. Voidable relations.                            | 13. Estoppel relations.               |
| 6. Ineffective relations.                         | 14. Discretionary relations.          |
| 7. Logically conflictive relations.               | 15. Defensive relations.              |
| 8. Biactive integral conflicts.                   | 16. Amorphous relations.              |

1. **Two leading kinds of mesonomic relations.**—Mesonomic relations may be considered: functionally and descriptively. Functional mesonomic relations are those which create, destroy, intercalate, or modify zygomic relations. As the term function itself implies, they are relations which are active in their effect on other legal relations. Descriptive mesonomic relations are those which have certain distinguishing juristic qualities as jural relations at rest, apart from any possible evolutive effects on other jural relations. Where a descriptive relation also has a jural function in evolution, such relation may be identified by both the descriptive and the functional name.

#### A. KINDS OF DESCRIPTIVE MESONOMIC RELATIONS

2. **Sovereign relations.**—There are two kinds of sovereign relations: (1) The relations of the state to subjects, and (2) the relations of the state to other states.

(1) Every jural relation is in form dyadic (involves two persons) and dypolic (has two jural poles). It can not have either more or less than two persons and two poles. In substance, however, a jural relation is triadic and dypolic. The

dyadic elements of a jural relation are a dominus and a servus and the triadic element is supplied by the state itself, since a relation can not be a jural relation without the support of the state. In other words, unless the state enters into the relation to support it the relation is only anomic. Now, since the power of the state is what gives to a relation its specific jural quality, it is apparent that the state itself can never be in normal jural relation to one of its own subjects or to a subject of a foreign state. In any event, the state can not constrain itself as the servus of a relation.

In modern times, the state has assumed many functions which are not strictly peace-maintaining functions. This has given rise to many relations where a subject may have claims in contract or in tort either against the government or against the state itself. There are two kinds of actual relations in which the state may be placed: (i) It may be the dominus of the relation, or (ii) it may be the servus of the relation.

(i) *The state as dominus of a legal relation.* Where the state commands that a crime shall not be committed, is there in sound juristic theory a duty owed to the state by the subject not to do the unlawful act? If there is a duty, it can hardly be a duty owing to anyone else—not to officers of the government, not to the person, if any, who has been harmed by the unlawful act, and certainly to no other person. If there is a duty, it seems clearly to be a duty owing to the state itself. But is there such a duty? Or, is the command of the state to be rather understood as a threat of the creation of a power in officers of the government if the law is violated? If we say that there is a duty owing to the state, then we encounter a legal relation which is in substance not triadic, since the state is at once dominus of the duty relation and supplies the state force to make it a jural relation. That solution, we believe, is juristically allowable and it involves no logical contradiction of legal theory. The state may be a dominus of any relation and may at the same time occupy the favored position of being able to affirm that it is a jural dominus, or, in other words, that the relation is a jural relation. Moreover, the convenience of legal analysis



requires that view, just as it requires the hypothesis of a sanctional claim to corporal integrity in private law as the reason for imposing a sanctional judgment on the person who invades it. In this view of the matter, there may be duties owing to the state and liabilities ligable to the state; the state may be the dominus of claims and powers. These relations, therefore, are zygnomic relations.

But may there be mesonomic relations as against a state dominus? For example, if the statute of limitations has run against a crime, assuming that the benefit of the statute must be pleaded in defense, is the power relation (to prosecute the crime) a simple power (mesonomic relation) or a nexal power (zygnomic relation)? An answer to this question depends on whether the power (to prosecute) is a power of which the state is dominus or whether it is a power of which a state officer is dominus. If the state is dominus, the limitation statute is simply an auto limitation and the power relation is zygnomic since the state can not confer power on a subject to be used against itself. If an officer of the state is dominus, the relation is mesonomic, since the state intervenes in favor of the defendant against its own officer. It would lead us too far afield to justify the solution here, but we believe that the second alternative is the one which can be better supported.

(ii) *The state as servus of a legal relation.* This raises an entirely different question. From the standpoint of sociology, which is concerned with the actual forces that bear on human conduct, the conceptual nature of the state is simply an explanation of human conduct in the legal field, and to that extent this concept is a force to be regarded among a large number of other forces. For the sociologist, the concept of the state is only a contributing factor which is overridden by many other forces of a psychic, economic, and ethical kind. For the lawyer, however, and for the political scientist dealing with his specialty from a legal standpoint, the conceptual nature of the state with the attribute of juridical sovereignty, is a controlling idea to which all other ideas must submit in the technical operations of the law. From the standpoint of the sociologist, therefore, the politi-

cal complex called the state is a multi-centered combination of colliding class interests and the idea of juridical sovereignty is inadmissible and unnecessary; but for the lawyer and jurist, the state as the concept of juridical ultimateness is an indispensable basic presupposition. Unfortunately, the two points of view are often confused in disregard of the fact that each for its own special purpose is a true view.

From a juristic standpoint, while the state can be the dominus of a legal relation, it is logically unthinkable that the state can be the servus of a jural relation. If the state permits its officers to entertain claims against itself and to address petitions to 'courts' which it has established, the relations represented by such claims and powers can not constrain the state and such relations, if they are jural relations, therefore, can not be zyg-nomic relations.

Are such relations jural relations? The answer hardly admits of doubt. These relations are dealt with by agencies appointed by the state itself in the form of legal relations, and since there is no question that what is dealt with is relations, these relations seem clearly to be jural relations wanting nothing to distinguish them from zyg-nomic relations except the absence of the constraining element.

(2) Relations of the state to another state. These, too, are mesonomic relations. In the field of what are known as 'justiciable' questions, they are not unlike the jural relations of private law, but in substance they do not differ from moral relations in that they are not triadic. There is no superior legal force to create a *juris vinculum*. The force behind intersovereign relations is moral force based on tradition, custom, reason, and the fear of punitive reaction.

There are three reasons for including them among jural relations: (a) They resemble jural relations in all qualities except that of state imposed force; (2) they deal with relations of the state from which the element of legal force is derived; (c) they are treated in practice as jural relations and are the preoccupation of the lawyer class.

**3. Contingency relations.**—There is an element of contingency in every legal relation. This contingency is not in the *existence* of the legal relation, since a legal relation is assumed to exist. The relation itself is not contingent, but there may be (a) uncertainty of the evolution of the relation; (b) uncertainty whether an event may change the jural character of an existing relation; and (c) uncertainty whether an external act (i. e., an act not the content of an existing relation) may change the jural character of the relation.

We are concerned here not with zygomic relations, the evolution of which can not be predicted. For example, there is no absolute certainty that the debtor will pay his debt. The evolution of the relation is, therefore, contingent. We are not concerned either at this point with legal relations which may be converted into mesonomic relations, or, contrariwise, into zygomic relations, by an external act. Nor, lastly, are we here dealing with zygomic relations which may be converted into mesonomic relations by an event. This progressive narrowing of the field reduces the sphere of contingency relations to mesonomic relations which may be converted into zygomic relations by an event including the operation of time.

Relations of this type are illustrated by inchoate dower, contingent remainders, contingent, springing, and shifting uses, executory devises, possibilities of reverter, and contract obligations dependent on future events.

These relations from the standpoint of function are regenerative relations.

**4. Conditioning relations.**—These relations are of the same general type as contingency relations, the only difference being that a contingency relation does not become converted into a zygomic relation until an event, upon which the contingency of the relation rests, happens, while a conditioning relation is not converted into a zygomic relation until an act of some person not the dominus of the relation is performed upon which the condition of the relation depends. Contingency relations are not, as we have seen, contingent relations; nor are conditioning relations conditional relations. In both cases there are jural

relations which are uncontingent and unconditional as to their present existence. The factor of contingency or of condition bears only on the possibility of transformation of the relation into a relation of a higher jural type, dependent, respectively, on an event and on an act.

Relations of this type are illustrated by estates in expectancy dependant on acts, claims against sureties and indorsers, future rents, future wages in an existing employment, options, the power of a subsequent creditor to participate in execution upon a conveyance fraudulent against, and set aside by, an existing creditor, and, especially, contract obligations dependent upon a condition precedent. For example, where there are dependent bi-promissory contract relations, there must be tender of performance on one side before the other dependent promise becomes a nexal duty. Until then, both promises are simple promises and the relations on both sides are mesonomic.

These relations, also, functionally, are regenerable relations.

**5. Voidable relations.**—These relations hardly need any explanation. They are types of jural relation which because of a conflicting power may be abrogated. Thus, a legal relation created by an infant's sale of a chattel may be abrogated by the infant's disaffirmance. The relation of ownership consequent upon the sale stands in jural conflict with the infant's power of disaffirmance. As between the adult buyer and the infant, the buyer's title is made up of mesonomic relations, and the infant's power is a zygnomic relation.

Again, a conveyance made in fraud of creditors is valid between the grantor and grantee, but it is abscindable by any defrauded creditor. As to creditors, therefore, the grantee's ownership is a simple title (the relation is mesonomic) and the creditor's power is nexal (the relation is zygnomic).

Voidable relations are scindable relations. Scindability regularly should operate on existing relations and not upon relations which already have evolved, but instances may be found where the courts have given the idea of rescindability a retrospective operation to affect relations no longer in existence. Thus, where *A*, an infant, put a certificate of stock indorsed in blank in the

hands of *B* to sell and where *B* sold the stock through *C*, a broker, a transfer of the stock being made by *D* (the corporation) conveying the seller's interest to *E*, *B* and *C* were held liable for conversion on the theory of rescission and in the same action *D*, the corporation, was held not liable. The decision is difficult, if not impossible, to justify upon its own logic. Voidable relations are effective for all purposes until avoided. If, before being avoided, they are evolved, they can no longer be affected by disaffirmance; only the consequential relations can be disaffirmed. In the instance noted, if (as was the case) *B* after receiving the proceeds of the sale prevailed on *A* to lend the sale money to *B*, a disaffirmance could only reach either (a) the loan transaction, making *B* liable to turn over the equivalent of the sale transaction in an action of trover, upon demand and refusal; or (b) the title of *E* in the stock. If *D*, the corporation, is not liable (as was held), it is not apparent on what theory *C* can be liable. Since both *C* and *D* had no knowledge of the infancy, it is difficult to understand how *C* is responsible and *D* not responsible, even upon the difficult legal operation of relation back; that is to say that *C*'s act, lawful when done, is now unlawful by relation back. The same result would also attach to *D*'s act of making the corporate transfer.

Voidable relations usually involve heteromorphic jural conflicts (i. e., conflicts of different basic kinds of relation: i. e., a conflict of claims and powers) but they may also involve homomorphic conflicts of conflicting powers. Voidable relations include both sanctional and non-sanctional conflicts.

**6. Ineffective relations.**—<sup>1</sup> Voidable relations are effective relations until avoided, but ineffective relations can only be

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<sup>1</sup> This important category of jural relations has been overlooked in juristic classifications. 'Rechtsgeschäfte' (so-called 'juristic' acts) are divided into two classes: (1) 'Gültigkeit' (validity) and 'Ungültigkeit' (invalidity). The latter term again has two divisions: (i) 'Nichtigkeit' (voidness) and 'Anfechtbarkeit' (defensibility). This classification is inaccurate in not making a place for ineffective relations.

The classification of jural relations into 'valid' and 'invalid' (as above) and the treatment of 'invalid' relations as 'void' and 'voidable' relations is still more defective in that it makes no place either for 'ineffective' relations or for 'unenforceable' relations which are hereinafter treated under the head of conflictive relations.



made effective by a subsequent fact. Ineffective relations are chiefly of three kinds: (1) Relations ineffective because of personal abnormality, such as sex, age, bodily defect, etc.; (2) relations ineffective because of present want of power (not based on personal abnormality) to create effective jural relations; and (3) relations ineffective because of the absence of some form required by law.

*Personal abnormality.* This is illustrated by the contractual promise of an infant. Such a promise is ineffective unless it is ratified by the infant after he attains his majority. Until that time, the legal relation is only mesonomic. If there is a counter promise to the infant of an adult, that counter promise is the content of zygomic relation of which the infant is dominus.

*Defective powers.* An unauthorized act of agency later may be ratified by the putative principal, but until the act is ratified, the relation remains mesonomic. The question suggests itself here whether the ultra vires acts of a corporation (where they are not held to be absolutely void) are acts invalid because of defective power or because of defective capacity, but inasmuch as the problem at present is clouded by many divergent views in the actual decisions of courts, it will not be profitable in this connection to attempt to consider it.

*Informal relations.* Relations of this description are defective as zygomic relations because of the absence of an element of form not going to the existence or substance of the relation. Oral contracts for the sale of land, a deed without a seal (where seals are required), defects in pleading (i. e., the exercise of a power relation) curable by verdict, and various other procedural irregularities which are cured by corresponding irregularities or failure in apt time to object, illustrate this type of mesonomic relation.

Consideration is no part of a promise but it is an essential element of form for the creation of a contract (legal relation). Promises without consideration create informal relations, but such relations are not legal relations since the absence of consideration goes to the substance of the relation. It can not be unilaterally supplied as may be done with an oral promise to

sell goods or lands unenforceable because of the statute of frauds.

It will be observed that ineffective mesonomic relations, in a wide sense, are conditioning relations; that is to say, relations which upon the performance of a conditional act are transformed into zygnomic relations. But in a stricter and in the more convenient meaning, ineffective relations are not conditioning. The signing of a memorandum to bind a vendor of land after a preceding oral bargain, is not an act within the scope of the mesonomic relation; it is entirely collateral. A conditioning mesonomic relation contemplates or expressly provides the very act which is to work the jural transformation.

Ineffective jural relations are also regenerable relations in function.

**7. Logically conflictive relations.**—There are various instances where jural relations are in logical conflict. Where such logical conflict exists, necessarily one or both of the relations must be mesonomic relations for the reason that two zygnomic relations can not be in logical conflict. The possible variations of these logical conflicts are but three, as follows:

- (1) Simple claim and simple power.
- (2) Nexal claim and simple power.
- (3) Simple claim and nexal power.

(1) A simple claim may be in logical conflict with a simple power. Thus, where a debt is barred by limitation, the creditor has a simple claim to payment, but the debtor has a conflicting simple power to refuse payment. The barred claim is a simple claim because it can not be enforced against the plea of the statute of limitations. The power to refuse payment must not be confused with the power to plead the statute. The power to refuse payment is a simple power (the relation is mesonomic); but the power to plead the statute is a nexal power (the relation is zygnomic) because the effect of it is to cut down a legal advantage of the claim holder, with the support of the law.

(2) A nexal claim may be in logical conflict with a simple

power. These instances are probably rare and difficult to find. An illustration of this species of logical conflict is where under a state insolvency statute with bankruptcy features, a debtor's estate is administered and a discharge granted from the debtor's obligations while a federal bankruptcy statute is in force but before a federal bankruptcy proceeding has been commenced. When a federal bankruptcy statute is in force, it supersedes any state bankruptcy statute without, however, nullifying it. In other words, the conflicting state legislation is suspended but not abrogated. Therefore, since a state discharge is an ineffective release of the debtor's obligations and since, if the conflicting federal statute later should be abrogated, the release would operate unconditionally as an effectual discharge, we have the somewhat peculiar situation of a claim which for the present may be enforced and the possibility if the claim is not enforced and, if the federal statute is repealed, that the same claim may then become unenforceable because of the state discharge. Juristically, this presents a jural conflict of nexal claim (to have payment) and a simple power to refuse payment. If the federal statute is repealed, the nexal claim disappears; it is not merely reduced to the jural level of a mesonomic relation. The same fact (the repeal of the federal statute), contrary to what on first impression would be supposed, does not raise the simple power to a nexal power, but destroys it also. There is no longer any power not to pay, since there is no legal relation now in existence concerning payment. There is, however, created an entirely new instrumental power, a conditional nexal power to defend successfully if an action is commenced on the extinguished claim. In that case there would also be a jural conflict. That conflict would be a simple power of suit in conflict with a nexal power of defense. This species of conflict is not logical, but integral, conflict.

The convenience of this juristic technic lies in this, that it keeps an account of the legal relations involved throughout the history of the various legislative facts that enter into the problem and makes it possible to account for the annihilation of the claim relation and the regeneration of the power relation by a rational explanation which shows not only what legal result is reached

but also precisely how it is reached. It avoids here as elsewhere a dangerous ellipsis characteristic of legal reasoning which leaps from investitive or divestitive facts to legal conclusions without taking note of the bridge of jural relations which necessarily must be crossed in an accurate juristic connection of the jural facts with the legal results.

(3) A simple claim may be in logical conflict with a nexal power. These instances are very frequent in the law and they constitute the most important field of logical conflicts both in the number and variety of the occurrence and the technical significance of this juristic phenomenon.

If, for example, a landowner grants an easement to another, the landowner's claims measured by the content of the easement have degenerated from nexal claims to simple claims and the easement holder has nexal powers in logical correspondence with the content of the landowner's claims, but in exact logical opposition to these claims. Within the scope of the easement what the landowner (before the easement) could claim, the easement holder (after the easement) can do.

It may readily be admitted that the jural situation, after the easement is granted, of simple claims on one side and nexal powers on the other in logical opposition, is a pure juristic hypothesis. There are other allowable, or at least possible, hypotheses. The hypothesis stated can justify itself above the others only from the standpoint of facility of application and logical consistency in a complete system of jural and legal concepts. There may be more initial difficulty in understanding a dualistic system of jural forces affecting each other in a measured degree than in understanding a view which is monistic and measurable only in terms of existence and non-existence of legal relations, but, if the dualistic theory gives better juristic results, it must be preferred. Put more concretely, it is easier to think of an easement as annihilating some portion of a landowner's rights or of cutting out a segment of ownership, but it is demonstrable that this view taken literally, and not as a mere figure of speech leads to logical difficulties that are insurmountable.

In the above triple enumeration of logical jural conflicts, it will be observed that no place is given to possible oppositions of claim and claim or of power and power. The reason for this is that there can be no logical opposition of one claim with another claim or of one power with another power involving the same act. All logical conflicts are heteromorphic. Logical conflict implies an internal contradiction as to precisely the same duty act or power act. There may be external (integral) conflict of claim with claim or power with power, or, in juristic terms, homomorphic conflict. These conflicts are important enough and distinctive enough to justify an enumeration in a separate place.

In the above discussion of logical conflicts, a separate place is not assigned to conflicts of immunity and privilege. Claims and powers are the ultimate and basic forms of jural relations. An immunity is simply a linguistic variety of claim; it is a reciprocating function of claim. A privilege, in turn, is simply a linguistic variety of power; it is a reciprocating function of power. There is, therefore, no need of a separate classification of the logical conflicts of immunity and privilege.

**8. Biactive integral conflicts.**—There are two kinds of biactive integral jural conflicts and each presents, necessarily, one or more mesonomic relations. Biactive conflicts may be either integral or logical. At this point we are concerned only with integral conflicts. The term 'conflict' has two meanings: (a) In logical conflict it has a neutralizing effect (i. e., claim and power are of equal jural force and neutralize each other, neither being potent enough to overcome the other); (b) in integral conflict it implies a destructive or degenerative jural effect. Conflict never has a regenerative function as in the case of conditioning relations. The first kind of biactive conflict is shown where the same two persons as to two separate (but conjunctive) jural relations are in turn dominus and servus, respectively, of the given relations. This conflict is called 'homadic' conflict because the same two persons present the conflict to be considered. The second kind of biactive conflict is shown where two persons are respectively domini of jural relations having the same content



(act) in whole or in part and where the servus is the same in both cases. This conflict is called 'heteradic' conflict because the persons attached to these two jural relations are different as to their domini. The difference between these kinds of conflictive relations can best be understood by a diagram.

*Homadic conflict*

$$\left\{ \begin{array}{l} A \\ B \end{array} \right. \left[ \begin{array}{c} \xleftarrow{+} \\ \xleftarrow{+} \end{array} \right] \begin{array}{l} B \\ A \end{array} \quad \text{or} \quad \left\{ \begin{array}{l} A \\ B \end{array} \right. \left[ \begin{array}{c} \xrightarrow{+} \\ \xrightarrow{+} \end{array} \right] \begin{array}{l} B \\ A \end{array}$$

*Heteradic conflict*

$$\left\{ \begin{array}{l} A \\ B \end{array} \right. \left[ \begin{array}{c} \xleftarrow{+} \\ \xleftarrow{+} \end{array} \right] \begin{array}{l} C \\ C \end{array} \quad \text{or} \quad \left\{ \begin{array}{l} A \\ B \end{array} \right. \left[ \begin{array}{c} \xrightarrow{+} \\ \xrightarrow{+} \end{array} \right] \begin{array}{l} C \\ C \end{array}$$

[*Explanation:* The letters indicate the domini and servi of the relations. The square brackets show zygonomic relations; the curved brackets show mesonomic relations. The braces indicate a jural complex. In each instance the content is a positive act, the left arrows being duty acts and the right arrows being power acts.]

The possible variations in each of these two kinds of biactive integral conflict are:

- (1) Nexal claim and simple claim.
- (2) Simple claim and simple claim.
- (3) Nexal power and simple power.
- (4) Simple power and simple power.

9. **Homadic conflict—illustrations.**—(1) Satisfactory instances of direct collision of a nexal claim with a simple claim are not easy to find. One of the illustrations that quickly suggests itself is set-off against a nexal claim barred by limitation which may be used defensively. Where set-off operates as in French law, 'de plein droit,' assuming that the two claims are for the same amount, there is no homadic conflict because both relations are extinguished as in the case of payment. Where the nexal claim is for a smaller amount, the result also is destructive of the nexal claim, but where the nexal claim is for

a larger amount, the effect is destructive modification of the nexal claim. Where, however, set-off operates only procedurally, the illustration is inapt since it then presents an instance of nexal power and simple power apparently with the peculiarity that the nexal claim (the debt claim) is supported, not by a nexal power of suit, but by a simple power of suit, while the simple claim (of debt barred by limitation) is supported not by a simple power of defense but by a nexal power of defense.

Another and perhaps better illustration is recoupment as in the case of partial failure of consideration. In the early law, the two claims were distinct and disjunctive claims, and it may therefore be assumed that in modern law they are still distinct claims but are now conjunctive relations where the evolution of one has a jural effect upon the other and where procedurally one may directly obstruct the other. Still another instance is the power of a foreign corporation which has not complied with domestic registration laws to recoup in a domestic action brought against it. A further illustration is discussed in some detail under defensive relations.

(2) For an illustration of direct conflict of one simple claim with another simple claim, we have only to suppose a case where claims which may mutually be set-off or where claims which are subject to recoupment or counterclaim, are unenforceable on both sides. These cases seem to be unimportant, and they probably are rarely presented for adjudication.

(3) A nexal power may be in direct homadic conflict with a simple power, as where a principal has power to revoke the power of his agent. The principal's power is a nexal power; it cuts down a legal advantage of the agent. The agent's power to bind his principal is a simple power since it enables the agent to cut down indirectly the principal's freedom of action by creating directly a legal relation which may have a nexal effect.

(4) Simple power may be in direct homadic conflict with another simple power as where one person has power to occupy a *res nullius* against any other person or persons having similar powers to occupy the same *res*. The exercise of the first power destroys the others.

10. **Heteradic conflict—illustrations.**—(1) A nexal claim may indirectly be in conflict with a simple claim. An illustration of this is the priority in a chose in action of one of two equal equities.

(2) A simple claim may be in indirect conflict with another simple claim as where two equal equities are in conflict with a third superior equity, in a chose in action. The conflict illustrated is of two kinds: (a) conflict of a nexal claim with a simple claim, and (b) conflict of a simple claim with another simple claim.

(3) A nexal power may be in indirect conflict with a simple power as in the case of a senior and junior execution or a senior and junior mortgage.

(4) A simple power may be in indirect conflict with another simple power, as where two junior executions are deferred to a senior execution.<sup>2</sup>

11. **Plurinary integral conflicts.**—There are instances where the duty or the liability is plurinary and where there is also an integral conflict of jural relations. Typical instances are the innocent purchaser for value of land or chattels, conflicting equities in ownership, and claims of pledgees. This species of jural conflict is very complex and because of this fact and its juristic peculiarities it deserves to be specially classified. What these juristic peculiarities are may be seen from an analysis of an instance.

In a pledge relation, there are, first of all, two polarized relations: (a) The nexal duty of the pledgor to tender payment of the debt; and (b) the simple duty of the pledgee to return the pledge after tender of satisfaction of the debt. The second relation is a conditioning mesonomic relation; it rests upon a conditional act uncertain to be performed.

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<sup>2</sup> The idea of jural conflict is treated by the pandectists under the name 'collision of rights' but with a variety of meanings not always clearly differentiated. See *Bekker* "System des heutigen Pandektenrechts" (Weimar 1886) I, § 24.

In the same pledge relation (which is a jural complex) there are two other unpolarized relations: (a) The nexal claim of the pledgee to possess (i. e., not to be interfered with in his possession) as against all other persons including the pledgor; and (b) the simple claim of the pledgor to possess conditioned upon his tender of payment of the pledge debt as against all other persons including the pledgee. The juristic peculiarity lies in these latter two relations (considered as complexes). The investitive facts identify the pledgor and the pledgee; therefore as between these persons the two relations are polarized. Against all other persons, the relations in the same two cases are unpolarized since the investitive facts do not identify these other persons.<sup>3</sup> It follows that plurinary relations which involve integral conflict are both homadic and heteradic.

Another typical instance of another sort of plurinary integral conflict is the power of the defrauded seller to rescind the defrauding buyer's title in a chattel. Until the seller exercises his power of rescission, the buyer is owner of the chattel as against all persons including the seller. A trover action could be maintained by the buyer against the seller unless the seller's interference operated in itself as a rescission of title. In this instance, therefore, the seller's power of rescission is not simply in direct jural conflict with the buyer's claim against the seller not to interfere tortiously with the chattel, but the seller's power is in indirect conflict with all the buyer's claims as against all other persons. The power of rescission operates directly

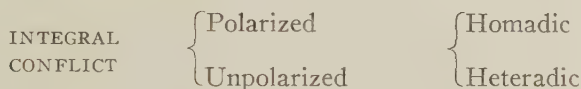
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<sup>3</sup> It is not our purpose here to consider in detail the juristic difference between polarized and unpolarized relations, but an illustration used elsewhere must be differentiated to avoid possible misapprehension. Where *A* offers to *B* a grant of land, and *B* accepts the offer of grant, the resulting relation of ownership is unpolarized because the evolution of the power to accept did not juristically identify the grantor for any creative purpose to any greater extent than any other person. The evolution of the power, of course, identified the grantor as the one who suffered a destruction of his legal relations to the land. But the destructive function accompanied by juristic identification is disconnected for any practical purpose with the creative function which does not, in the case put, identify the grantor or any other person.

In the case of pledge, the pledge relation is accessory to the debt relation. If the poles are identified by the principal relation, necessarily they are identified in the accessory relation. The two cases, therefore, of grant of land and pledge, are juristically in different classes.

and also indirectly. It operates directly to extinguish the seller's duty to the buyer; it operates indirectly to extinguish the duties of all other persons to the buyer.

These conflicts may conveniently be summarized in the following diagram:



12. **Suspended relations.**—Suspended relations differ from contingency and conditioning relations in this, that a contingency or conditioning relation rests upon an event or an act which must occur before the relation is regenerated into a zygomic relation, while a suspended relation has become degenerated by an act or event which does not create a conflictive complex. By this definition, an informal relation or an ineffective relation, on the one hand, are not within the definition because informal relations and ineffective relations have not suffered degeneration. On the other hand, suspended relations do not include voidable and conflictive relations since voidable relations are a special kind of conflictive relation and all conflictive relations are excluded.

Suspension of legal relations may arise in various ways and some of the important categories are the following:

(1) *Jurisdictional suspension.* Jurisdictional suspension may arise because of the temporary cessation of the activities of courts or of a special jurisdiction; for example, the writ of habeas corpus may be suspended by the political power in time of war. Again, a person servient to a legal relation may be a non-resident without any property interests that can be reached by attachment. An alien enemy may be without power to institute suit during the time of war. In England, formerly, a civil remedy for an injury feloniously committed was suspended until the criminal remedy had been pursued. Where a creditor of a debtor becomes executor of his estate, there is no merger of personæ, the creditor and executor being different legal persons but procedurally there is a suspension.



(2) *Voluntary disablement*. The dominus of a jural relation may disable himself by an act of his own. Thus, where a tenant for life having an appendant power of appointment and revocation demises the land for ninety-nine years, he can not later execute the power and defeat this demise.

(3) *Merger of personæ*. At the common law, for some purposes, there was a theoretical merger of the persona of the wife in that of the husband. All personal property owned by the wife before marriage was vested in the husband absolutely. As to land, the husband had the rents and profits during coverture, but the land itself remained in the ownership of the wife, and was hers absolutely after the husband's death and descended to the wife's heirs if she pre-deceased the husband unless a child was born, whereupon the husband became a tenant for life. A clear case of suspension growing out of this theoretical merger of personæ is shown at common law by chattels not reduced to possession and choses in action. During coverture, the husband has a power to reduce them to possession. The example is one of integral conflict of a nexal power and a simple claim. Upon the termination of coverture, the simple claims as to chattels and choses in action not reduced to possession are regenerated into nexal claims.

(4) *Conjunction of estates*. Various jural effects may result from a conjunction of rights. (a) If two different estates vest in the same person with no intervening estate, usually the smaller estate is merged in the larger. Thus a tenancy for 999 years which unites with a life estate in the same land in the same person is merged in the life estate because the term, though longer than the duration of any person's life, is a lesser estate than a freehold. (b) Sometimes two or more different polarized rights unite in the same person. Thus, where there has been a conversion of chattels and a money realization by the tortfeasor, the original owner may sue either in trover or in assumpsit. Again, a creditor may own a debt jointly owed by two (or more) persons. In these cases there are not conditioning rights but conditional rights; that is to say, there is no condition prece-

dent to the existence of the rights, but there is a condition subsequent attached to each right. These instances present the juristic phenomenon of double rights. (c) Sometimes the conjunction in the same person of two rights or estates results in the suspension of one of them. This is commonly found in the coming together of two estates where there is an intervening estate. Thus, if a life tenant lets his land for a term and later, within the life of the life tenant, the termor obtains the fee in the same land, there is no merger. The termor still remains the tenant of the life tenant. The jural effect is that between the life tenant and the termor now owning the fee, the fee is suspended.

(5) *Miscellaneous instances of suspended relations.* An infant during minority can sue only by next friend and defend only by a guardian ad litem. The power of suit and the power of defense are suspended but a substitute power in another person is given during the period of suspension.

The disseized owner of land has more than a chose in action against the disseizor. After recovering possession he may recover mesne profits. This is explained by the theory of relation back, but that is a pure fiction and unnecessary if we regard the disseized owner as still a simple owner of the land. The relation to the land and to the profits is a regenerable mesonomic relation.

The maker of a note may lose a defense against the holder of the note by negotiation of the note, but the power of defense may become revived if after maturity the same person again becomes owner of the note.

13. **Estoppel relations.**—Estoppel exhibits the basal category of an Immunity-Disability relation. The estoppel assertor has an immunity, and the estoppel denier lies under a disability. The estoppel denier is disabled from making an effective procedural assertion of a jural claim because of his previous conduct. The power to assert the estoppel against the assertion of the jural claim is a biactive procedural conflict, but we are not concerned at this point with conflictive relations. The point of the matter is that the existence of the disability does not affect the

existence of the jural claim, but it does affect the jural quality of that claim. While the claim still exists in spite of the disability to make it procedurally effective, yet the claim because of the estoppel has become degenerated into a simple claim. In certain circumstances the simple claim may become regenerated after a so-called transfer of the claim relation. Thus, if an owner of a chattel stands by and allows the chattel to be sold, as between the buyer and the owner, the buyer is entitled to have possession. The owner has a simple claim in the chattel and the buyer has a nexal claim in the same chattel. This is a homomorphic integral conflict. If, however, the owner sells and delivers the same chattel to an innocent purchaser for value, the innocent buyer's claim is a nexal claim and prevails over the claim of the estoppel assertor whose nexal claim has degenerated into a simple claim.

There is a theory of estoppel that the estoppel assertor gets nothing but an immunity against the estoppel denier, but we believe that theory is untenable since it would be simply a procedural immunity. It is not juristically conceivable in a logically organized body of juristic concepts that an instrumental (procedural) advantage can stand alone and detached from a substantive advantage which is protected. We can not say that the estoppel assertor is a complete owner, nor yet can we say that he has no legal relation to the res except the procedural advantage of a shield against attack as if he were an owner. The latter alternative is a pure fiction and an unnecessary one, since a workable solution is afforded by the completer logical theory of jural conflict.

While estoppel relations exhibit basically the features of jural conflict, they perhaps deserve a separate enumeration because of their juristic peculiarities.

**14. Discretionary relations.**—Discretionary relations have two forms: (a) Discretionary powers; (b) discretionary duties. Discretion may consist in whether the content of the relation shall or shall not be evolved (i. e., whether the power shall be exercised or the duty performed). Discretion may also consist in the kind of an act to be evolved. Discretionary powers may

be either zygonomic or mesonomic relations. The power of the judge in imposing a sentence for conviction of crime may lie between limits fixed by the legislature; this power is nexal. The power of an agent is always a simple power.

Discretionary duties consisting of discretion in whether the duty shall or shall not be performed are clearly mesonomic relations. Likewise, if there is discretion in the content of the duty, the relation is mesonomic. One may exist without the other. Thus, a public officer may lie under a duty to act, but the content of the act may be discretionary. A judge may be compelled to sign a bill of exceptions but the manner of the exercise of the duty-power is discretionary. This example presents another illustration of complexity within a unit relation. We have seen that there may be a complex of two conjunctive claims in one unit relation. In this case there is a complex of two conjunctive duties in one unit relation. There is a nexal duty to act and there is a simple duty to act in a discretionary manner.<sup>4</sup>

Instances of discretionary relations are numerous in the field of public and administrative law, in church law, and in school law. The fact that a duty is discretionary does not take away from the fact that a legal relation exists. A student entitled to petition a faculty for a degree under the rules of the school may not perhaps, if discretion is reserved, require a vote in his favor, but he is legally entitled to have the discretion exercised. But, on the other hand, the fact that discretion exists does not always implicate the existence of a duty to exercise it.

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<sup>4</sup> Where, as shown above, the same dominus has two claims only one of which can be made effective, the legal phenomenon may be designated internal alternative complexity. Where there is a duty to act and discretion as to the content of the duty act, the phenomenon may be described as internal composite complexity. The significance of the term 'internal' is to point out that a unit relation is in question and to distinguish unit complexity from the complexity that arises between two or more unit relations, as for example in conflictive relations. Internal alternation may exist also in duties; thus the servus may have the choice of alternative duties.

Against the doubt of composite unit relations, it seems clear that when mandamus issues to perform a discretionary duty, the manner of performing the duty is not and can not be controlled. This leads to the conclusion that the duty is composite, consisting of a formal nexal duty to act but leaving a simple duty of the substantial content of the act juristically to be separately accounted for.

**15. Defensive relations.**—There are often cases where a claim or power may be used as a shield but not as a sword. Instances have already been noted above. Thus, there may be recovery in a court of equity for improvements innocently made although no direct action could be maintained in a court of law. This may be considered in two ways: (a) As a condition precedent to the complainant's right to relief; or (b) as a conflictive complex of different claims.

As between these two views, we believe the preference lies with the second. The legal situation is more than that of a conditional right (i. e., a claim realizable only after the performance of a condition precedent by the dominus of the claim). The defendant in a court of equity comes forward with an independent claim to a performance. Procedurally, it is still true that the defendant's claim is made effective upon the condition that the complainant takes a decree which in its turn gives the complainant the remedy sought by him on the condition that he satisfies the defendant's claim. We must not confuse here the claim and the power. The power relations (of suit and defense) are in integral biactive conflict. The power relations are both mesonomic; they are interactively subject to conditions; the complainant must do equity to get his decree and the defendant must await the complainant's election to take the conditional decree.

The claim relations, however, present a different species of integral jural conflict. The complainant is entitled to an act upon a condition to be performed by himself. Since the condition is under the control of the dominus of the relation, the relation is not strictly conditioning and the relation is therefore not mesonomic but zygnomic. The defendant's claim is a simple claim. The conflict is that of nexal claim and simple claim.

At the risk of irrelevance, it may be pointed out that the existence of a condition does not always imply a counter legal relation. To bind an indorser of a promissory note it is necessary to give notice to him upon non-payment of the note, but while this is a condition to the realization of the holder's claim against the indorser, the condition is not a duty to the indorser. The indorser may set up in defense the lack of notice, not by way of a duty to him but by way of a strict defense as in the



case of payment. If there were such a duty, the indorser could bring action on it, unless it were a duty such as that above considered to pay compensation for good faith improvements. But the indorser's defensive use of the condition differs from the improvement case in that the defense is solely obstructive and not indemnificative. Therein lies the distinction.

Defensive relations also are special types of the major category, conflictive relations; but they also deserve separate enumeration.

**16. Amorphous relations.**—Sovereign relations are zygomic relations in form but are mesonomic relations in substance. Amorphous relations are or may be zygomic relations in substance but are mesonomic relations in form. These are legal relations of a shifting and continually changing nature growing out of an investitive fact which can not or does not precisely define the detail of each separate unit relation which arises thereafter.

Illustrations of these relations are found in the complex relations of husband and wife, parent and child, master and servant, and partnership. The line of separation is based on the test whether there is a sharp separation of evolution in the various powers that are exercised and duties performed within the complex. A building contract is or may be very complex, but it comes to an end with the attainment of a specific object, and all the various complex acts to follow may be definitely provided for, in advance, by the parties. In a trading partnership, on the other hand, while the general powers and duties of the partners may be enumerated, yet they are not provided for specifically since the economic affairs of the partnership shift from day to day. In the still more complex personal and proprietary relations growing out of marriage, the character of the legal relations that are daily and hourly being evolved are so amorphous that practically they are hardly regarded as legal relations at all. Most of these detailed and shifting relations are mesonomic relations either because of their discretionary quality, if duties, or because they are non-adversary, if powers.

But even in these institutional complexes, a legal relation may stand out sharply if there arises a serious abnormal evolution of

any one of the constituent relations. Until then, these relations are amorphous and whether zygnomic in substance or not, they are mesonomic in form in that they are either not regarded in practice as legal relations or do not present themselves as such. In early law, and especially in family law, the submergence of these institutional relations to a sub-jural level was much more conspicuous than in modern law.

#### B. SUMMARY

The descriptive mesonomic relations discussed above may be re-enumerated as follows:

1. Sovereign relations.
2. Contingency relations.
3. Conditioning relations.
4. Discretionary relations.
5. Defensive relations.
6. Amorphous relations.
7. Conflictive relations.
  - (a) Logically conflictive relations.
  - (b) Voidable relations.
  - (c) Ineffective relations.
  - (d) Suspended relations.
  - (e) Estoppel relations.

In this summary, it will be observed that conflictive relations have been regrouped under five distinct types.

## CHAPTER XII

### JURAL INTERRELATIONS

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|---|--|
| 1. Jural classification.                  | 9. Homologous and heterologous relations.    |
| 2. Nomic and anomic relations.            | 10. Dypolic and polypolic relations.         |
| 3. Mesonomic and zygnomic relations.      | 11. Homadic and heteradic relations.         |
| 4. Prevenient and postvenient relations.  | 12. Homotaxic and heterotaxic relations.     |
| 5. Unitary and plurinary relations.       | 13. Homomorphic and heteromorphic relations. |
| 6. Conjunctive and disjunctive relations. | 14. Homogenous and heterogenous relations.   |
| 7. Congruent and conflictive relations.   | 15. Application of terminology.              |
| 8. Homomeral and heteromeral relations.   | 16. Dependent and independent relations.     |

1. **Jural classification.**—Jural relations may be classified from two standpoints: (a) According to their relations inter se irrespective of their internal qualities; (b) according to their internal qualities irrespective of their external relations to other jural relations. The second method of classification (according to internal qualities) has been quite fully developed in the pandect treatises and in English works on jurisprudence so far as concerns rights in the strict sense (claims), but neither the pandect nor the jurisprudence treatises appear to have attempted either (i) a systematic classification of powers or (ii) a systematic classification of the relations of jural relations inter se. This chapter deals with some of the significant categories in one of these undeveloped fields of classification—the relations of relations.

2. **Nomic and anomic relations.**—Preliminary to this formal classification, the field of relations must first be divided so that legal relations will be separated from non-legal relations.

If a landowner walks on his own land or cultivates the land, he is in various *physical* relations to other persons. These rela-

tions may be expressed in terms of physical or chemical science, of morals, of psychology, of economics; but until the act in some way comes into contact with a legal rule, the landowner's liberty to use or abuse his land has no legal significance. It is entirely outside the field of law. The involved relations are not at any point, whatever their significance with reference to other persons or to things, legal relations. Again, if *A* invites *B* to dinner, there is a social relation. If *B* accepts the invitation there is a new social relation. But in neither case is there a legal relation. The law is not concerned with mere deportment. The invited guest may act as badly as he pleases with reference to the invitation, but the law will not interfere.

And, again, *A* may harbor evil thoughts toward *B*. Ordinarily, this fact standing alone does not enter the field of law. Such relations may be called *ANOMIC* relations in contrast with *NOMIC* relations.

**3. Mesonomic and zygnomic relations.**—*Nomic* relations are of two kinds: (a) constraining legal relations which may be called *ZYGNOMIC* relations, and (b) non-constraining legal relations which may be called *MESONOMIC* relations. If *A* has loaned money to *B*, the relation of *A* and *B* is *zygnomic*. The relation of *A* and *B* is a constraining relation. It does not depend for its enforceability upon the intervention of any new jural fact. If, however, after maturity of the debt, the new jural fact of negative prescription (statute of limitations) intervenes, the claim of *A* against *B* is no longer perfectly enforceable. Yet, the claim of *A* against *B* may or may not be a perfect moral claim. In either case, it is anomic unless the law also will recognize the claim by enforcing it either offensively or defensively, or will treat it as regenerable<sup>1</sup> by jural facts falling short of what is necessary in other cases.

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<sup>1</sup> Regenerable relations (i. e., those which may be regenerated) are one of the important classes of mesonomic relations. Regenerable does not imply necessarily that the relation had by a preventient jural fact, degenerated, although this is often the case as in the instance above under discussion. An infant's executory promise may create a regenerable relation, but here there was no antecedent degeneration of the promise relation.

Zygnomic relations may be economically fortified (e. g., security may be given on an unsecured claim) but they can not be regenerated since they are already relations that constrain the servus, with the support of the law.

The relations discussed up to this point may be consolidated into the following progressive diagram:

TABLE NO. I

Relations	{	Nomic	{	Zygnomic <sup>2</sup>
		Anomic		Mesonomic
	{			

The kinds of *nomic* relations may be classified: (1) According to their temporal order of occurrence; (2) according to the number which co-exist at a given time; (3) according to their connection or lack of connection: (a) whether in conflict or not in conflict; (4) according to their similarity: (a) in polarity, (b) in form (c) in arrangement, and (d) in origin; and (5) according to their dependence or independence.

**4. Prevenient and postvenient relations.**—From the point of view of order of occurrence, legal relations may come before or after a given point of time. Those which precede are PREVENIENT relations. Those which follow are POSTVENIENT relations.<sup>3</sup>

<sup>2</sup>In the first and succeeding tables of relations, the terms of lesser importance for purposes of legal analysis, are indicated by italics. Thus, zygnomic relations while they are superior in legal operation to mesonomic relations are inferior in technical importance since, apart from questions of scope, they rarely come into question inter se.

<sup>3</sup>Resolution is the generic term for destruction of a legal relation. Destruction as applied to a legal relation is a figure of speech; it indicates that quality of a legal relation which attaches when it no longer serves any demonstrable function in legal analysis. Resolution may occur by *evolution* (i. e., the dynamic projection of the relation); for example, in a duty to pay a debt, the payment of the money which is the content *involved* in the relation, is *evolved* by the performance of the duty act. Resolution may also take the form of *internal devolution*; as for example, when, instead of paying a debt, the debtor fails to pay. Resolution takes the form of *external devolution* when a supervenient jural fact appears (e. g., impossibility of performance). The terms *intervenient* (which implies causal relation) and *supervenient* (which implies lack of causal relation in the relation of reference) are explained in the above text.



*Prevenient relations.* *Prevenient* relations (a) may be parts of the same causal claim or (b) they may be disconnected from the chain of reference and (i) arise out of an independent jural chain or (ii) arise from an event. *Prevenient* relations in the chain of reference may be called *PRE-INTERVENIENT* relations. *Prevenient* relations not in the chain of reference may be called *PRE-SUPERVENIENT* relations. *Pre-intervient* relations may be proximate to a new involution, or they may be remote links in the chain leading to a new involution. The proximate relation may be called a *causal* relation, and the remote relation may be called a *sub-causal* relation.

*Postvenient relations.* *Postvenient* relations may be organized in a similar manner. *Postvenient* relations (a) may be parts of the same causal chain or (b) they may be disconnected from the chain of reference and (i) arise out of an independent jural chain, or (ii) arise from an event. *Postvenient* relations in the chain of reference may be called *POST-INTERVENIENT* relations. *Postvenient* relations not in the chain of reference may be called *POST-SUPERVENIENT* relations. *Post-intervient* relations may be proximate to an evolution, or they may be remote links in the chain flowing from an evolution. The proximate relation may be called a *sequential* relation, and the remote relation may be called a *sub-sequential* relation.

Though this terminology is, in the main, self-revealing, it may be useful to illustrate it by a simple example as follows: *A*, an artist, agrees with *B* for a payment on account, to paint *B*'s portrait, the remainder of the price to be paid after delivery and approval of the portrait. Let three situations be assumed: (1) That the contract is fully performed on both sides; (2) that *A* becomes ill and is unable to perform; (3) that after the portrait is delivered, *B* dies.

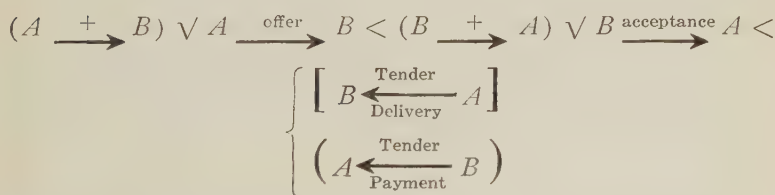
The offer of *A* (and the mesonomic relation from which it is evolved<sup>4</sup>) is *prevenient* to the acceptance of *B* (and the meso-

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<sup>4</sup> Any act which has legal significance proceeds from a relation. If the direct effect of evolution of the relation is to constrain the servus of the relation with the aid of the law, the relation is *zygnomic*; otherwise it is *mesonomic*. Thus, the offer of *A* is the evolution of a mesonomic power relation of which *A* is the dominus. Clearly, the offer act does not constrain *B* who is under the liability of having such an offer made to him.

nomie relation from which the acceptance flows).<sup>5</sup> Both mesonomic relations are prevenient to the binary legal relations which follow. When the portrait is delivered and accepted, the title of *B* in the portrait is a sequential relation flowing proximately from the acceptance of delivery or approval, as the case may be, and the involved legal relation (i. e., power of acceptance which is mesonomic) and flowing subsequently from the relation in which *A* was constrained to tender delivery (zygnomic). It may be observed that at any attained point in the causal chain, the relations going before are prevenient and that those following are postvenient. If *A*, the artist, becomes ill and is unable to perform, the illness is pre-supervenient to any new legal relations (e. g., to pay back the payment made on account). If *B* dies, the event is post-supervenient to the zygnomic relation requiring *B* to pay or pre-supervenient to the duty of the personal representatives of *B* to pay.<sup>6</sup> Symbolically, the situation leading up to the creation of the binary relation may be shown as follows:

TABLE NO. II



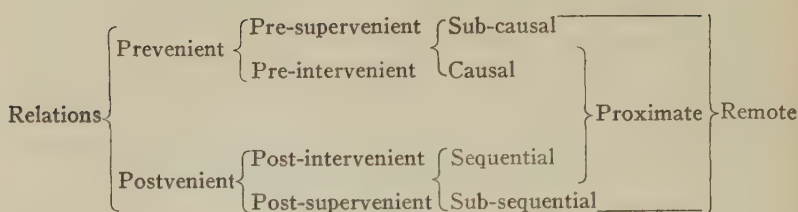
[Explanation: Right arrows are power; left arrows are claims; the bracketed arrows indicate relations; the unbracketed arrows indicate jural facts; parenthesis = mesonomic relations; square brackets = zygnomic relations;  $\vee$  = evolution;  $<$  = 'resulting in'.

The relations last discussed may be consolidated into the following diagram:

<sup>5</sup> Here, again, the acceptance act of *B* does not directly constrain *A*. Its immediate effect is to create a nexal (i. e., one that binds) claim to performance. That claim is a zygnomic relation, because it immediately constrains *A*.

<sup>6</sup> Usually convenience will be served in using terms signifying causal sequence, by relating them to zygnomic relations exclusively since in practical nomoanalytics mesonomic relations generally are elided.

TABLE NO. III



5. **Unitary and plurinary relations.**—Given legal relations may be considered singly or in combination with others. The art of legal reasoning lies in understanding (a) the full scope of the content (the act involved, whether of duty or of power) of isolated legal relations and (b) in understanding how the evolution of one relation bears upon the involution of another relation. Legal relations considered singly may be called **UNITARY** relations and relations considered in combination may be called **PLURINARY** relations. *Plurinary* relations may be *binary* (e. g., bi-promissory contract relation), *Trinary* (e. g., suretyship relation—duty of principal debtor, duty of accessory debtor, duty of exoneration), *quaternary*, *quinary*, etc.

In a concrete legal situation, there is always a manifold of legal relations, but only those whose evolution can affect other legal relations, and the relations so affected, come under consideration.

6. **Conjunctive and disjunctive relations.**—Interconnected relations constitute a jural complex. To put a simple illustration, if *A* had a claim of debt against *B*, and *B* has failed to pay the debt, the evolved relation is the claim to have money paid. The relation now to be evolved is the claim to have damages which can be enforced by evolution of a power relation in *A* against *B* by resort to action. There may be a manifold of other coincident legal relations at any point in the legal situation, but they are disregarded unless they have an interconnection with the significant facts to be evolved. Thus, *A* and *B* have claims to corporal integrity, etc., against each other. One may be liable

to the other for tort damages. One may owe a duty to the other upon a contingent contract claim. All of these other relations belong to other complexes. Therefore, in a given legal complex, various relations are interconnected, and others existing at the same time are unconnected. The connected relations may be called **CONJUNCTIVE** relations, and the unconnected relations may be called **DISJUNCTIVE** relations.

**7. Congruent and conflictive relations.**—Disjunctive relations may be eliminated as not entering into the technical complex. *Conjunctive* relations present two situations: (a) When there are plural relations in which the domini are the same person. The servi may be the same person or different persons. These plurinary relations are **CONGRUENT** (convergent) relations. Legal advantages converge in one identical dominus.<sup>7</sup> (b) When in plurinary relations entering into the same complex, the domini are different persons, the relations are **CONFLICTIVE**. *Conflict* of legal relation may be either (i) *logical* or (ii) *integral*. Logical conflict can exist only in mesonomic relations or between mesonomic and zygemonic relations, but integral conflict may exist in all legal relations whether mesonomic or zygemonic.

The relations last discussed may be consolidated into the following diagram:

TABLE NO. IV

Relation	{ Unitary Plurinary	{ Disjunctive Conjunctive	{ Congruent Conflictive	{ Logical Integral

**8. Homomeral and heteromeral relations.**—Plurinary relations which are similar in all their parts of qualities [i. e.,

<sup>7</sup> Contrariwise, there may also be congruent disadvantages; i. e., where the servus stands in plurinary relation to a plurality of domini. This is an instance of divergence. Thus, a carrier is under a legal duty to receive and transport goods offered by the various individuals who constitute the public. As pointed out, however, elsewhere, this plurinary relation is an elliptical, mesonomic relation until a particular person tenders goods for transportation when the relation becomes zygemonic (i. e., the carrier then is constrained with the aid of the law).

polarity (persons) form (claim or power) arrangement and origin] are HOMOMERAL relations. Plurinary relations which are unlike in one or more qualities are HETEROMERAL relations.

**9. Homologous and heterologous relations.**—Plurinary relations which are substantially alike are HOMOLOGOUS relations. Plurinary relations which are substantially unlike are HETEROLOGOUS relations. More specifically, those plurinary relations which are the same in form (claim, immunity, privilege, power) and in arrangement (taxonomy) i. e., congruence of legal advantages, are homologous, even though the servi of these disadvantages are different persons<sup>8</sup> or that the advantages in question arose from different jural facts. By exclusion, the remainder are heterologous relations.

**10. Dypolic and polypolic relations.**—Two persons are involved in every legal relation. A legal relation may be considered as having poles, each pole being represented by a person. In a unitary relation, there are only two poles represented by only two persons. A two-pole relation is a *dypolic* relation. It is also a *dyadic* relation since only two persons are concerned. In a *binary* relation (= two legal relations in one complex) there are necessarily *four* poles, but the poles may be represented by two persons or they may be represented by three persons. If the binary complex involves two persons, the complex relation is a *tetrapolic* dyadic relation. If the binary complex involves three persons, the complex relation is a tetrapolic *triadic* relation. The poles of plurinary relations are always arranged in classes of couples (e. g., dypolic, tetrapolic, etc.), but the persons who represent the poles are arranged in regular arithmetical series (e. g., dyadic, triadic, etc.).

**11. Homadic and heteradic relations.**—If, in plurinary relations, the persons involved in the complex are the same persons

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<sup>8</sup> Thus, the plurinary claim of *A* not to be slandered is homologous with the plurinary claim of *B* not to be slandered. Here the servi are or may be the same in both cases. Again, the claim of *A* that he shall not be slandered by *X* is homologous with the claim of *A* that he shall not be slandered by *Y*.



in both or all relations, the relations are HOMADIC; if the persons involved differ, the relations are HETERADIC.

12. **Homotaxic and heterotaxic relations.**—If the persons are the same and the arrangement (taxonomy) of the poles is similar, i. e., if the dominus of one relation is the dominus of the other, the relations are HOMOTAXIC. If the taxonomy is dissimilar, the relations are HETEROTAXIC.

13. **Homomorphic and heteromorphic relations.**—If, in plurinary relations, the same type of legal advantage (claim, immunity, privilege, or power) is involved in the complex, the relations are HOMOMORPHIC. If different types (forms) are involved; the relations are HETEROMORPHIC.

14. **Homogenous and heterogenous relations.**—Plurinary relations may arise from the same jural fact or from different jural facts. If they spring from one jural fact, they are HOMOGENOUS. If they spring from different jural facts, they are HETEROGENOUS relations.

15. **Application of terminology.**—One or two illustrations will show the application of this terminology.

If *B* owes *A* two independent money performances, let us say one for money loaned and another because of a tort committed, these are non-plurinary, non-binary relations of which *A* is the dominus. They are *disjunctive* relations, since there is no juristic connection between the relations; they do not enter into a legal complex. They are *homologous* relations by force of the definition, since *A* has a claim in each case and since the taxonomy (arrangement) is the same in each instance; i. e., there is one dominus. They are *tetrapolic* relations (= four poles). They are *dyadic* relations because only two persons (*A* and *B*) are involved. They are *homadic* relations because the same two persons (*A* and *B*) represent the poles of each relation. In this case, we may say, the polarity is identical. They are *homomorphic* relations, because *claims* are found in each case. They are *homotaxic* relations as already shown. They are *heterogenous* relations because the jural facts of their creation are different—

one duty of performance arises from a loan of money; the other duty of performance arises from a delictal act. Even though these two acts should have occurred at precisely the same moment, the relations would still be heterogenous.

Again, *A* has claims to corporal integrity against indeterminate persons. These relations are plurinary, *polypolic*, *heteradic*, *homomorphic*, *homotaxic*, and *homogenous*. Likewise, according to the definition, they are *homologous*.

Again, to put another case, if *A* and *B* have cross-claims against each other arising out of the same transaction, the relations are *heterologous*, *tetrapolic*, *dyadic*, *homadic*, *homomorphic*, *heterotaxic*, and *homogenous* (or *heterogenous*, depending on the jural facts).

The relations last discussed may be consolidated into the following diagram:

TABLE No. v

Relations	<i>IHomomeral</i>	{	<i>IHomologous</i>	{	<i>IHomadic</i>	{	<i>IHomomorphic</i>	}
	<i>IHeteromeral</i>							
			{		{		{	
			<i>IHomotaxic</i>		<i>IHomogenous</i>		<i>IHomotaxic</i>	
			<i>IHeterotaxic</i>		<i>IHeterogenous</i>		<i>IHeterotaxic</i>	

**16. Dependent and independent relations.**—Plurinary relations are also dependent or independent. Dependence of relation may be found in any one of the following points:

(1) The involution of one relation may coincide with the involution of another relation arising from the same jural fact, or the resolution of one relation may coincide with the resolution of another relation arising from the same jural fact. Thus, in the case of a bi-promissory contract, the acceptance of an offer of a promise for a promise is the causal involutive fact of a conjunctive binary relation. If one of the promises was delivery of a chattel and the other promise was payment of a price, and if we suppose that the chattel was one with particular reference to which the contract was made and was destroyed without fault, this supervenient event operates as a resolution

of the binary relation. The involutive or resolute fact is a mutual condition of the existence, of the postvenient or prevenient relations.

In the case last put, if we suppose that tender of delivery and tender of payment were intended to be practically simultaneous,<sup>9</sup> the instance is one of coincidence of two mesonomic relations—neither relation is enforceable as it stands. But coincidence may exist also as to conflictive relations of which one is zygnomic and of which the other is mesonomic. Thus, when a person is born, the involutive fact of birth creates nexal claims of corporal integrity against persons generally not identified by the involutive fact of birth, and the same fact creates as many simple powers as there are claims, to violate the person's corporal integrity. The relations, therefore, are plurinary zygnomic relations on one side and plurinary mesonomic relations on the other. The zygnomic relations *converge* in one dominus; the mesonomic relations *diverge* from different domini to one servus.

(2) The evolution of one relation may result in the involution of another relation. This may arise: (a) In cases where the relations are of the same grade (e. g., where both relations are mesonomic); and (b) where the relations are of different types (i. e., where one is zygnomic and the other is mesonomic). The first of these varieties alone is of technical significance in this connection and may be illustrated by the examples above put of a contract for sale. In this case, the binary complex consists of two mesonomic relations; one of a duty to make tender

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<sup>9</sup> As in the case of so-called concurrent conditions. The term 'concurrent,' except in the sense of coincidence is meaningless. Two conditions can not mutually depend on each other. Where a contract is silent as to which evolution is due first, one necessarily must come first or else there will be a perpetual impasse. It might be plausibly argued in a case of sale of goods for a money price that since money as such is not a thing (cf. Terry "Leading Principles" § 56) since there is a power of recaption of goods, since title would not pass to goods unless payment immediately followed, and since normally in the absence of express bargain, money is the measure of performance, that in all such cases, tender of delivery is an independent condition precedent to the enforceability of the claim to payment. If this view is adopted, the binary complex has the same jural qualities as shown in Table No. 2 ante, although in the text which follows above, the view is illustrated which is found in the language of the courts; viz., that both of the binary relations are mesonomic.

of delivery; and the other of a duty to make a tender of payment. Assuming that neither relation can be enforced as it stands, the evolution of one relation (e. g., tender of delivery) is a condition precedent to the enforceability of the other relation (i. e., tender of payment, and vice versa). More accurately, neither relation can be enforced even after condition is performed, but rather the evolution of one is a condition precedent to the involution of a new enforceable relation. Relations of the class just considered are *alternative* and the involutive fact is a *reciprocating condition* where the evolution of one of two relations of the same grade is a condition to the involution of a new relation. Where the jural results of evolution of two conjunctive relations of the same jural rank differ, there is an *alternative condition*. For example, a debtor may pay, or he may exercise his simple power of not paying resulting in a new legal relation requiring the payment of damages.<sup>10</sup>

Dependent relations of the class above discussed are conditional relations. Dependent relations not based on conditions are unconditional relations.

(3) Dependence of relations may also be parasitic, where one relation is, as it were, a host and another is a parasite. The host relation is the **PRINCIPAL** relation and the parasite relation is the **ACCESSORY** relation. Thus, a mortgage is accessory to a debt; a dominant estate is accessory to a servient estate; a guaranty is accessory to the principal debt; a power to terminate a license is accessory to ownership.

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<sup>10</sup> Since the law can regulate only future conduct, it seems more convenient to treat conditions as always precedent to a *future* legal relation. There is one exception, viz.: in the law of Dominion where since the res stands out more prominently than in the law of Obligation, it is more convenient and more in accord with our habits of thought to regard conditions as precedent or subsequent to the existence of title. (Cf. *Salmond "Jurisprudence"* (3d ed.) § 81, p. 210). In contracts, however, the jural nexus stand out, and in all cases for practical purposes, conditions are precedent. There may, however, be a condition subsequent to the existence of a contract duty; performance or breach will destroy it; but these facts are not properly considered as conditions. In the instance of an insurance policy conditioned to be void unless suit is commenced within a period short of the statute of limitations after loss has occurred, the condition is precedent to a nexal power to sue with legal effect: *Holmes "Common Law"* 317.

(4) Dependence of relation may also be *phylactic*. In this case there is a protecting and a protected relation. A relation may be thought of as self-protecting (*autophylaxis*) or as protecting itself for its own sake and as likewise protecting another interest (*heterophylaxis*) or, lastly, as protecting another relation alone (*allophylaxis*). If the first two of these possibilities are demonstrable in the law,<sup>11</sup> yet they probably have no special significance, and the last form alone needs to be separately classified. Phylactic relations are constituted of the protective relation, the barrier or wall shielding another relation (parietal or, to carry out the terminology used, *ectophylactic*, relation) and the relation protected (intraparietal, or *endophylactic*, relation). For example, the power of self-defense is involved in a legal (parietal) relation, which has for its object the protection of the intraparietal claim of corporal integrity. It will be observed that a parietal (ectophylactic) relation does not embody any substantial interest of the dominus. It is like a wall which is intended for the protection of a garden plot.<sup>12</sup>

(5) Dependent relations are also ELECTIVE or non-elective. Elective relations are either PRELATIVE or SUBLATIVE. For example, if *A* has converted the chattel of *B* and sold it for money, *B* may elect to sue *A* either in *assumpsit* or in *trover*. When the election is definitely made for legal purposes, the relation chosen is *prelative* and the relation waived is *sublative*.

The relations last discussed may be consolidated into the following diagram:

TABLE No. VI

Relatives	{ Dependent	{ Conditional	{ Principal	{ Parietal	{ Prelative
	{ Independent	{ Unconditional	{ Accessory	{ Intraparietal	{ Sublative

<sup>11</sup> When a pledge is given, the pledgee has possession and may maintain possessory remedies. The pledge claim is a protective relation for the safeguarding by possession of the claim to a money or other performance. The pledgee's possession considered apart is *autophylactic*. If it is disturbed, a new legal relation protects it. Considered in connection with the ultimate interest of the pledgee, it is *allophylactic*. If, however, a case is found where the thing possessed is to be used by the security holder (e. g., usufructuary pledge) the relation is *heterophylactic*.

<sup>12</sup> See *Wigmore* "Cases on Torts" II, Appendix A, s. v. "Prophylactic Rights."





## CHAPTER XIII

### POLARIZED AND UNPOLARIZED RELATIONS

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|-------------------------------------|---|
| 1. Rights in rem—Austin.            | 8. The test of general and special facts. |
| 2. Terry's analysis.                | 9. The test of causal relation.           |
| 3. Criticism of Terry's analysis.   | 10. Test of the character of the duty.    |
| 4. Salmond's analysis.              | 11. Identification test.                  |
| 5. Vagueness of the term.           |   |
| 6. Hohfeld's analysis.              |   |
| 7. Criticism of Hohfeld's analysis. |   |

1. **Rights in rem—Austin.**—We may begin by inquiring, What is a right in rem? The definition of Austin adopted from the modern civilians has been so often repeated that it seems *prima facie* a doubtful labor at this late day to question it. The definition runs as follows: "Rights in rem may be defined in the following manner—'rights residing in persons and availing against other persons generally.' Or they may be defined thus: 'Rights residing in persons, and answering to duties incumbent upon other persons generally.' By a crowd of modern civilians 'jus in rem' has been defined as follows: '*facultas homini competens, sine respectu ad certam personam*,' a definition I believe invented by Grotius."<sup>1</sup>

Difficulty has often been found with the terminology,<sup>2</sup> but, in essence, Austin's definition, or, perhaps, more accurately, the civilian definition, remains the standard, accepted one, not only in Anglo-American, but also in continental, jurisprudence.<sup>3</sup> But in recent years discussions have appeared which expressly or implicitly raise doubts as to the validity of the civilian definition.

<sup>1</sup> *Austin* "Jurisprudence" (4th ed.) I, p. 381.

<sup>2</sup> Thus, *Holland* ("Jurisprudence" 143, 11th ed.) who would prefer to speak (144) of "rights of indeterminate incidence." See also *Markby* "Elements of Law" (6th ed.) § 165.

<sup>3</sup> *Windscheid* ("Pandekten" 9th ed.) whose book is the leading continental work in its field, says that "absolute rights [rights in rem] are those which avail against all persons" (§ 41).

2. **Terry's analysis.**—It has been, heretofore, universally admitted that rights (claims) and duties are correlatives. One can not speak of a claim without at the same time implying a duty, nor, conversely, can one speak of a duty without at the same time implying a claim. Claim and duty are two sides of the same idea. Consequently, when a claim begins or ends, a corresponding duty begins or ends; and, conversely, when a duty begins or ends, a corresponding claim begins or ends.<sup>4</sup> The analysis of "protected rights" by Mr. Terry in his notable book,<sup>5</sup> seems to run counter to the classical notion of the correspondence in terms of claim and duty, if "protected rights" are rights at all and not merely, as Mr. Salmond has suggested,<sup>6</sup> "the *objects* of rights *stricto sensu*." In speaking of rights in rem Mr. Terry says:<sup>7</sup>

"Sometimes the investitive facts on which the right (claim) depends may arise independently of the remaining investive facts whose presence is necessary to the creation of the duty, *and even at different times*."

Mr. Terry gives as an example of such a severance of claim and duty, the case where one takes possession of a thing previously unowned with the intention of becoming owner. He admits that duties exist arising out of the facts stated against certain persons, but adds that as to persons not within the jurisdiction of the state which confers the rights, duties do not exist, but first come into existence when these persons come within the jurisdiction. In order fully to understand the point, it is necessary to go back to Mr. Terry's analysis of "protected rights." In passing, it may be remarked that no analysis is to be found in the literature of jurisprudence which shows a more interesting and penetrating dialectic and which at the same time is more difficult of apprehension than Mr. Terry's discussion of "correspondent" and "protected" rights.

The content of a "correspondent" right according to Mr. Terry is acts, while the content of a "protected" right "is a condition

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<sup>4</sup> *Austin* "Jurisprudence" (4th ed.) I, 34.

<sup>5</sup> "Leading Principles of Anglo-American Law" (Philadelphia 1884).

<sup>6</sup> *Salmond* "Jurisprudence" (3rd ed.) p. 197, n. 2 § 76.

<sup>7</sup> "Leading Principles" § 129.

of fact which will begin or continue to exist as a consequence of the acts being done or omitted.”<sup>8</sup> One of the very striking peculiarities of the analysis is that to create a cause of action, it is not sufficient that a “correspondent” right be violated—the “protected” right also must be infringed. In some cases, that is to say, in the case of rights in personam, the same act violates both the correspondent right and the protected right, but in the case of rights in rem, the mere violation of the correspondent right is not enough for an actionable claim, since the protected right is not necessarily infringed. One of Mr. Terry’s illustrations will make this more definite:

“Suppose that a city is charged by statute with the duty of keeping its streets in repair and negligently allows a dangerous hole in one of them to remain open and unguarded. *A*, when passing along the road at night and using due care, falls into the hole and breaks his leg. The first impulse of any one on being asked what duty the city had broken would be to reply, the duty to keep the street in repair, or at least to use due diligence to keep it in repair; and if asked what right of *A*’s was violated, to answer, his right of personal security. But this brings up difficulties. If the statement of the duty is correct, then it was broken as soon as the street was allowed to remain in the unsafe condition and a reasonable opportunity had been presented for making the repairs, and before *A* fell into the hole; and it would equally have been broken had *A* never fallen in at all. Consequently, whatever right of this kind corresponded to the duty must have been at the same time violated. But *A*’s right of personal security was not violated until he was actually hurt.”<sup>9</sup>

Another of Mr. Terry’s illustrations will be useful:

“Let *A*, for example be the possessor of a large dog having a propensity known to *A*, to kill sheep, and let *B* be a neighbor of *A*’s and the possessor of sheep. *A* owes a duty to *B* to keep his dog from killing the sheep, and *B* has a correspondent right covering exactly the same ground as the duty, that the dog be kept from so doing. Here the two sets of facts, the possession of the dog on one side and of the sheep on the other \* \* \* are obviously quite independent of each other. *A* may have had

<sup>8</sup> Op. cit., § 125.

<sup>9</sup> Op. cit., § 119.

the dog with the known vicious propensities long before *B* had any sheep, or, on the other hand, *B* might have kept a flock of sheep if *A* had never possessed a dog \* \* \*. If *B* is the possessor of sheep, though he will not have a correspondent right against *A* of the sort just mentioned until *A* becomes possessed of a dog, yet there may be often persons in the vicinity having such dogs between whom and *B* complete jural relations will at once exist \* \* \*. Still it is conceivable that a right of this kind, a preparedness to have jural relations, might exist where there was no one who had any corresponding duty."<sup>10</sup> An example of the situation last mentioned is where "the legislature should create a new sort of property right in the sea or seabottom below low-water mark or in waste lands belonging to the state, to be acquired by filing a claim in some public office, but available only against aliens. A man who had duly filed his claim might be said to have a right, although there was not for time being a single alien within the jurisdiction of the state."<sup>11</sup>

These illustrations may be summarized under three juristic situations:

(1) Where certain acts, required by law for the protection of the interests of personal property, security, and other like interests, are not performed, but no invasion of the interest results from what is done or omitted to be done; as, for example, the case of the failure of a municipality after reasonable notice of a defect in the public street, to repair.

(2) Where, as to persons within the jurisdiction, there is an absence, on one side or the other, of the facts necessary to create a jural 'nexus' as to certain specific acts; as, for example, when *A* owns sheep but there is no owner of a vicious dog, or when there is an owner of a vicious dog but no owner of sheep.

(3) Where there is an interest but no person can be found in the jurisdiction who owes a duty in respect of it; as, for example, ownership of the seabottom as against aliens only.

3. **Criticism of Terry's analysis.**—As to the first situation, it is clearly incorrect to say that the mere failure to keep a

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<sup>10</sup> Id.

<sup>11</sup> Id.



street in repair is a violation of any duty. This usage, however, is prevalent in technical parlance, but only as an elliptical expression, where the consequences of the omission are already present. It is difficult to see the inconvenience of saying that the complete and accurate expression of the duty is to exercise reasonable care to avoid harm to the interest of another. It seems contrary therefore, to the usage of professional speech (properly understood as an elliptical symbol) and to the prevailing scientific analysis to regard an act of the kind under consideration (i. e., a duty in rem) as a violation of any right whatsoever. The supposed difficulty presented by the fact that the persons to whom the duty-act is due may be unknown or be not yet within the jurisdiction, seems to rest on the view that the duty in such a case exists 'in solido,' while the corresponding rights exist 'pro parte.' It is the merit of the late Professor Hohfeld to have brought out clearly that in its normal ambit a so-called right in rem is not a single right, but that there are as many rights in rem as there are persons who owe corresponding duties.<sup>12</sup> As to all persons—at least as to all those already in the jurisdiction—the municipality in the example given, owes each one a duty not to cause harm to his interests. If strict legal theory requires (and we believe it does not) that when any one of such persons goes out of the jurisdiction, the particular duty which was due to him comes to a legal end, there is no diminution of the duties owed to all other persons. If there is any inconvenience in regarding duties as owed to persons who are not ascertained, this inconvenience is one which embraces all so-called rights in rem. The obvious solution is to abolish all rights in rem.

As to the second situation, it may be argued that *A*, an owner of sheep, is as much entitled as against *B*, his neighbor, not to have his sheep killed by a vicious dog of *B*'s as well before as after *B* becomes possessed of such a dog. Whether *B* presently has such a dog or not would seem to be irrelevant. The duty is conceptual and not factual. The law takes no note in prescribing

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<sup>12</sup> *Hohfeld* "Fundamental Legal Conceptions as Applied in Judicial Reasoning" *Yale L. J.*, 26:710 (740 sq.).

duties, whether the person owing the duty has the physical or economic capacity to perform or to violate his duty. This may be illustrated even in rights in personam where the inability of a debtor to pay does not in the slightest way affect the full measure of his legal duty. But the converse of the argument does not follow. The owner of a vicious dog can not owe duties to another with respect to an ownership of sheep, unless such other person owns sheep. The existence and ownership of sheep are the investitive facts which create at once the claim and the corresponding duty. If the physical or economic capacity of persons owing duties were to be taken into account for any purpose, then such factors would be essential for consideration for all similar purposes; and it might then be claimed that a resident of New York City has no claim not to have an assault and battery committed against him by a resident of Buffalo because the physical distance between the owner of the claim and the bearer of the proposed duty is too great to make the violation physically possible. To say, as Mr. Terry does, that correspondent rights are enlarged by the fact that a man stores gun-powder in his house, or becomes editor of a newspaper and may thus utter libelous statements, is clearly a departure from the traditional analysis of rights in rem; since it would appear that correspondent rights in rem avail not as against persons generally but only against those who have the physical capacity to violate one of the specific duties which the law prescribes for the protection of interests. Whether one agrees with Mr. Terry's analysis or not, it has the great value of emphasizing the complex and varied character of legal duties. When the point of departure in juristic or legal analysis is claims instead of duties, the richness of detail of legal duties as dependent on factual circumstances is sure to be submerged in a meaningless generalization difficult of practical application.<sup>13</sup>

As to the third situation, where there is no person within the jurisdiction who owes a duty, it may be argued that just as the investitive facts of a claim are determinative as well of the

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<sup>13</sup> It is to be noted, however, that Mr. Terry adopts a double arrangement of rights and duties treated separately: *op. cit.*, § 337.

duty as of the claim, regardless of the physical capacity of the bearer of the duty either to perform it or to violate it, so likewise the determinative fact of such a right as is now under consideration is the place of its legal recognition and not the residence of the bearer or bearers of the corresponding duty or duties. The law has nothing to do with the exigibility of a claim. The claim exists where the law promises legal remedies concerning it. If it were otherwise, when a debtor removed to another jurisdiction, the creditor's claim would become extinguished, or, at least, would become reduced to the level of an 'imperfect' right. In the seabottom example, when there is no alien within the jurisdiction, there is a protected right in the seabottom as an object of ownership, but there are no corresponding duties, according to Mr. Terry, because there is no one within the jurisdiction who can owe a duty. The only point of contact here with our discussion is that it is a case of a protected right in rem where there are no duties; but it seems clear that Mr. Salmond's suggestion is substantially correct, and that Mr. Terry's category of protected rights is not of rights at all but only the objects for which rights in the strict sense are created.<sup>14</sup> While Mr. Terry appears to accept the civilian definition of rights in rem, his actual analysis of "correspondent" rights in rem is a departure in introducing a factual element which disturbs the classical synchronism of claim and duty, and, by way of corollary, eliminates the indeterminate element which is the characteristic factor of the definition, by limiting the jural relation to concrete data which serve to identify the persons owing duties. In a certain sense, the persons of incidence of the right are still indeterminate since the investitive facts of the duty may be independent of the investitive facts of the claim, but this indeterminateness is of another kind than the civilian definition implies since by that definition there is but a single set of investitive facts which mark, at the same instant, the right and the duty.

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<sup>14</sup> An idea in some respects similar to Mr. Terry's "Protected Right" is the "Rechtsverband" developed by Puntchart but derived theoretically from Roman law sources, and employed for other technical purposes: "Die Moderne Theorie des Privatrechts und Ihre Grundbegrifflichen Mangel" (Leipzig 1893).

4. **Salmond's analysis.**—The next doubt which has been raised against the traditional definition is that suggested by Mr. Salmond in a work celebrated for its clarity of presentation. Mr. Salmond says:

"In defining a real right (right in rem) as one availing against the world at large, it is not meant that the incidence of the correlative duty is absolutely universal, but merely that the duty binds persons in general, and that if any one is not bound his case is exceptional \* \* \*. Even as so explained, however, it can scarcely be denied, that if intended as an exhaustive classification of all possible cases, the distinction between real and personal rights [rights in rem and rights in personam]—between duties of general and of determinate incidence—is logically defective."<sup>15</sup>

The author then proceeds to give as an illustration the example proposed by Mr. Terry:

"Why should there not be rights available against particular classes of persons, as opposed to the whole community and to persons individually determined, for example a right available only against aliens? An examination, however, of the contents of any actual legal system will reveal the fact that duties of this suggested description either do not exist at all, or are so exceptional that we are justified in classing them as anomalous. As a classification, therefore, of the rights which actually obtain legal recognition, the distinction between real and personal rights may be accepted as valid."<sup>16</sup>

According to this analysis, there are theoretically duties of three, instead of two, classes of incidence—duties of indeterminate incidence where neither the individuals nor the classes have been identified; duties of partly indeterminate incidence, where the class or classes but not the individuals have been identified; and duties of determinate incidence where the individuals themselves have been identified (or may be identified). But since duties are not duties of classes as such, it would seem that the dichotomy of the original classification can not be assailed even theoretically if otherwise valid. The analysis

<sup>15</sup> *Salmond "Jurisprudence"* (3rd ed.) p. 208, § 81.

<sup>16</sup> *Id.*

of Mr. Salmond is based on the misconception, which Professor Hohfeld has corrected,<sup>17</sup> that duties exist 'in solido.' Since duties are duties of persons and not of classes, these persons are identifiable, or they are not. Even though the pursuit of identification is narrowed to a class such limitation is still insufficient to identify the actual individual persons who owe duties.

5. **Vagueness of the term.**—The suggestion, though ineffective as a logical distinction, is still useful in calling attention again to the vagueness of the terminology. The phrasing, "against the whole world" (which Markby calls an "arrogant phrase"), "persons generally," or "indeterminate incidence" lack the qualities of logical precision. The expression "indeterminate incidence" is the least objectionable, and as an ultimate characterization is probably faultless. Its chief defect is that it disregards the legal causation which makes some duties indeterminate rather than determinate. It leaves the mystery unexplored why in one group of cases the persons who owe duties are legally important, while in the other group their identity (more correctly, identifiability) is of no consequence. All these terms are descriptive rather than definitive, and while they are usually sufficient for the purpose, especially when accompanied by concrete illustrations, they fail in conveying any clear-cut distinction in the jural relations to which they are sought to be applied. We gain no more by these interpretations in accuracy than if we called rights in rem "general rights," and rights in personam "special rights."

6. **Hohfeld's analysis.**—The completest examination of the nature of rights in rem is that made by Professor Hohfeld.<sup>18</sup> Professor Hohfeld shows that the term, right in rem, has a four-fold application: (a) In primary (sanctionable) rights; (e. g., rights [strict sense] in rem); (b), judicial proceedings (e. g., action in rem); (c) judgments and decrees (e. g., decree

<sup>17</sup> See note 12, *supra*.

<sup>18</sup> "Fundamental Legal Conceptions as Applied in Judicial Reasoning" Yale L. Jour., 26:710.



in rem); (d) enforcement of judgments and decrees (e. g., writ of assistance—secondary decree in rem).

For the purpose of avoiding the "linguistic contamination" which resides in the term 'right in rem,' Professor Hohfeld substitutes "multital claim," and he defines it as—

"\* \* \* One of a large class of *fundamentally similar* yet separate rights, actual and potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people."<sup>19</sup>

For the contrasting term, 'right in personam,' Professor Hohfeld substitutes "paucital claim" which he defines as—

"\* \* \* A unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a *few* fundamentally similar, yet separate rights availing against a *few* definite persons."<sup>20</sup>

7. **Criticism of Hohfeld's analysis.**—Professor Hohfeld has clarified thought by showing that a right in rem is correlated by a single duty, but apart from that contribution it may be doubted if he has made any advance in his definition of a right in rem. When it is said that a right in rem is "one of a large class of fundamentally similar yet separate rights," it may be asked, What is a large class? and, What is the meaning of "fundamentally similar"? The author was more concerned with the misapplication of the term under discussion than with the definition, in spite of the evident care taken to formulate an exact one. The insufficiency of the definition will be demonstrated if a single case can be found of a right such as the author illustrates which avails against only a few persons or against a definite class of persons. Suppose that *A*, a land owner, has granted an easement to every person in the state to walk across his land except to *B*. What is *A*'s right against *B* with respect to the duty not to come on the land? By the definition it is a right in personam. Moreover, it would be, in the author's terminology, a "unital claim" (i. e., "unique" and "uncompanied"). Yet,

<sup>19</sup> Op. cit., 718.

<sup>20</sup> Id.

there can be no doubt that this right is only a right in rem. The proof of the conclusion is *A*'s right against *B* was a right in rem before *A* made grants of easement to all other persons, and since no new juristic fact has entered as to this nexus between *A* and *B* the right continues to be what it was—a right in rem. Again, to take the illustration given by Mr. Terry, of a right in the seabottom available only against aliens—this is a right against persons of a definite class, and if it may be supposed that there are no rights against non-resident aliens, let it be assumed that *X*, an alien, becomes a resident. In that case, and by the supposition, there would be a right in rem against *X* only. If these objections are well grounded, we may pass to the inquiry whether a definition can be constructed of a right in rem which avoids the criticisms offered.

**8. The test of general and special facts.**—The attempt has been made to distinguish rights in rem from rights in personam by the character of the facts which give rise to them; rights in rem being based on so-called general facts (e. g., possession) and rights in personam being based on so-called special facts (e. g., contract). The terms 'general' and 'special,' however, are not satisfactory as applied to facts. They are of indeterminate meaning. They present no single concept out of which a logical proposition may be constructed. It would seem, moreover, that all facts are special even though it may be urged that some facts give rise to precisely the same kinds of duties, and may, in that sense, be called general. For example, the taking possession of a thing by occupation, has precisely the same general incidence of duties in one case as in another; or, again, the fact of a human being born alive, creates in every case the same general claim of corporal integrity, and, likewise, the same general incidence of duties. The last illustration shows the fallacy of the distinction, for the supposed general fact of birth may also create claims between parent and child which are rights in personam.

**9. The test of causal relation.**—Causal relation, also, has been suggested as the true test of distinction. Rights in rem

are those, according to this view, which in their origin involve no causal relation between the parties to the jural nexus, and rights in personam are those which, on the contrary, show a causal relation between the parties to the jural nexus. Thus, in title by occupation, there is no causal relation between the owner of the thing and the persons who owe the negative duties of non-interference with the interest of the owner. Again, in contract, there is a causal relation between the parties to the nexus created by offer and acceptance. But this solution also breaks down. One illustration will suffice. Where title to goods is obtained by specification, there is as much of a causal relation between the old and new owner as in the case of a violation of a contract duty, yet the right originated is in rem.

**10. Test of the character of the duty.**—The attempt to base the true distinction on the character of the duties suffers the same fate and is universally abandoned.<sup>21</sup> Rights in rem correspond, in modern law, to negative duties, but, theoretically, positive duties could be conceived of as the correlates of rights in rem, as was shown, at least in principle, in the ancient Hue and Cry legislation. In modern law, there are still occasional instances of conditional jural nexus where the conditional duty is in rem and of a positive character. The rule of law which requires the finder of a lost chattel to deliver it to a public depositary for the benefit of the owner is in point. The conditional duty as prescribed by the law rests on all persons within the jurisdiction, but the absolute duty can rest only on the finder. The conditional positive duty is therefore in rem, but the absolute duty is in personam.<sup>22</sup> On the other hand, rights in personam while almost exclusively correlated by positive duties, may yet embrace negative duties, as may be illustrated by the case of a contract of a seller of a business not to compete with the buyer,

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<sup>21</sup> Cf. *Salmond "Jurisprudence"* (2d ed.) p. 207, § 81.

<sup>22</sup> The category of conditional and absolute duties will not be confused with absolute and relative duties. See *Holland "Jurisprudence"* (11th ed.) p. 128. The right of a cestui as against third persons—except perhaps as to an equitable res. *Cave v. McKenzie* (1877) 46 L. J., Ch. 564—is also a species of conditional right in rem. The condition is the taking of trust res with knowledge of the trust.

or the contract of the singer who agrees not to sing in a rival theatre.

**11. Identification test.**—Rights are created, modified, and lost through jural facts. Only the creative facts need to be noticed since neither the alteration nor the extinguishment of a jural nexus is ordinarily of any importance in determining its nature. The creative fact alone determines what the right is. Jural facts are of two classes—acts and events—and both must be considered in an effort to define right in rem, since each of both classes of facts may create such a right. In the face of evident difficulty in reaching a right solution, and with a due appreciation of the peril of attempting a construction where destruction is the easier task, we venture to propose that a right in rem is one of which the essential investitive facts do not serve directly to identify the person who owes the incident duty. This right is unpolarized. A definition of right in personam will be formulated in the affirmative—there the essential investitive facts serve directly to identify the person who owes the incident duty. This right is polarized.

It is not probable that this proposal will escape criticism and in order to aid it at the points where misunderstanding might arise, a word of explanation may be desirable.

It will be noticed that while in the normal case the number of persons who owe duties corresponding to rights in rem is large, the definition proposed is not based on that characteristic, since it is not essential.<sup>23</sup> A crucial illustration will quickly show the range and application of the definition at a decisive point. When a person is born, he becomes invested by the mere fact of birth with certain rights in rem and rights in personam. For

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<sup>23</sup> It has already been suggested above that a right in rem may theoretically exist against a single person. It is not an extremely exceptional situation that within the same jurisdiction a right in rem may avail against all persons except one who himself may have a similar right in rem available against all but the other, and in the same object, with a territorial division of the operation of the respective rights as between the two separate owners. This is very likely to happen in the conflict of common law and registered trademarks. See *Hanover Star Milling Co. v. Allen & Wheeler Co.* (1913) 208 Fed. 513; *Hanover Star Milling Co. v. Metcalf* (1915) 240 U. S. 403; *Sartor v. Schaden* (1904) 125 Iowa 696, 101 N. W. 511.

example, a child just born is invested with the claim of corporal integrity. This claim avails against all persons including even the mother of the child. The investitive fact of the claim is the being born alive as a human being. The fact that the mother is *A* is not an essential part of the legally investitive fact, since the law takes no account of who the mother is or of her matrimonial status. The legally operative fact is birth alive as a human being regardless of who is the mother. In this instance the facts of nature must not be confused with the facts of the law. Since, therefore, the identity of the mother is an irrelevant natural fact, the essential investitive fact does not serve directly to point out the mother as one of the persons who owes an incident duty to the child's right of corporal integrity.

On the other hand, the birth of the child may create a claim in personam to support against the child's father who may be a hundred miles away at the moment of birth. The father is directly identified by the essential investitive fact; but in this case the essential investitive fact has a wider range than in the first instance. Birth alive, while sufficient for the right in rem, is insufficient for the right in personam now under consideration. The investitive legal fact includes or may include a wide circle of other facts—marriage of the parents, cohabitation within the period of gestation, birth of the child. The father is directly pointed out as owing a duty by the range of facts which the law will consider as relevant for the purpose of determining the existence of the right claimed. In claims in rem the identity of the persons of the incident duties is not material to the determination of the existence of the right.

It hardly needs to be added that the identity shown or not shown by the investitive fact has no connection with actual or psychological identification. The claimant of the right may fail to produce evidence of the identity which the operative facts implicate. Thus one may make a contract with the *B* Company, an unincorporated association, consisting of a thousand members. The operative facts legally identify each one of the members, although the actual fact of the membership may perchance never be ascertained.



## CHAPTER XIV

### CONTINGENCY IN JURAL RELATIONS

1. Statement of the problem.
2. Nature of contingency.
3. All jural relations involve contingency.
4. Kinds of contingency.
5. Certainty and uncertainty.
6. Internal and external contingency.
7. Simple and complex contingency.
8. Lineal and collateral contingency.
9. Vested and contingent remainders.
10. Existing duties or powers.
11. Appurtenant power of gain.
12. Non-appurtenant power of gain.
13. Grants of future contingent enjoyment.
14. Reversionary interests.
15. Future contract rights.
16. Future gains conditioned on the act of another.
17. Future property rights dependent on events.
18. Meaning of the terms 'possibility,' 'inchoate' right, and 'vested' right.

1. **Statement of the problem.**—The questions to be considered are: (a) The nature of contingency (using the term here in the wide sense of uncertain future events or acts); (b) the kinds of contingency; (c) the effect of contingency on relations of fact as bearing on the problem whether such relations are or are not jural relations; and (d) the character of jural relations affected by contingency.

2. **Nature of contingency.**—Contingency never can be predicated of any act, event, or relation either past or present; it is referable only to future acts, events, or relations. There is one proviso—that an existing relation whether jural or non-jural may be affected by future acts or events; an existing relation of fact may be denied present jural quality because of some future contingent act or event; an existing jural relation may be denied present zygomic character because of some future contingent act or event.

For example: *A* may expect, and have sound practical reasons for believing, that, if he makes a certain offer to *B*, *B* will accept the offer and thereby create a promissory obligation between *A* and *B*. *A* presently has a jural power to make his offer, but this power is a simple power which may or may not be exercised; nevertheless, it is a jural relation despite the contingency, because the evolution of the relation lies solely in the control of *A* who is the dominus of the power. The evolution is contingent but the contingency is in sole control of the dominus of the power.

Following the illustration, before *A* makes his offer, *B* does not have a present power of acceptance of an offer not yet made. *B*'s power to accept depends on the evolution of *A*'s power to offer. *B*'s power to accept is not a jural relation; it is not even a mesonomic relation; it is purely an anomic relation until *A* makes his offer, when, in turn, *B*'s power to accept becomes a mesonomic relation subject to the contingency of *B*'s actual acceptance. Moreover, if the offer is one of a promise for an act, it would seem that the power to accept can be assigned to another if the offer does not contemplate a 'delectus personæ.' The reason is that the completed act is a completed acceptance if no revocation of the offer has intervened. Where, on the contrary, the offer is of a bi-promissory relation, there is no similar blending of acceptance and performance by the same jural act; until an actual communicated acceptance is made there is nothing of practical significance to assign, although the power to accept is an actual legal relation.

Going a step farther, no contract presently exists in any jural form, however practically certain that such a contract will be made. In the illustration put, there is presently only one jural relation—the power of *A* to offer (and that relation is of the mesonomic order); the subsequent possible relations (the power to accept and the ensuing contract relation) are not yet in existence for any practical or legal purpose; they still rest upon the contingency that *A* may or may not make an offer.

Contingency, then, means uncertainty of happening (in the future) of some act or event. It does not affect the present existence of a relation. That relation may be jural or non-jural.

The precise question is how much and what kind of contingency can be admitted before (i) a given relation of fact is excluded from the realm of jural relations, and (ii) if such relation despite contingency is accepted as a jural relation, how it shall be classified as mesonomic or zygnotic.

For example, where the defendant fired guns near trees owned by the plaintiff in which rooks were in the habit of nesting whereby plaintiff lost the profits that he might have gained in young rooks that probably would have been hatched, it was held the plaintiff could not recover.<sup>1</sup> In another case, the defendant fired guns near the decoy pond of the plaintiff and frightened away wild fowl, and the plaintiff was permitted to recover.<sup>2</sup> In both cases, there were relations of fact. There was no contingency in the existence of these relations, but in both cases there was contingency whether the factual interest would be realized. The cases noted are distinguishable, not in contingency but on the ground that in the first case rooks were by statute a public nuisance. The first relation (rook case) was non-jural, but not because of contingency, and the second relation (wild fowl) was jural in spite of contingency.

**3. All jural relations involve contingency.**—Some relations of fact implicate contingency; others do not. A spatial relation or a relation of series or order does not implicate contingency. The relation exhausts itself by the mere fact of its existence. Jural relations, however, always implicate contingency because they invariably involve an act. The evolution of this act is always uncertain in all relations whether zygnotic or mesonomic.

For example: If *A* owes *B* \$100, to be paid on January first, the time is certain, but the evolution of the debt relation is entirely uncertain. There is no certainty that *A* will pay or will fail to pay his debt. The continued existence of the relation to the evolutive date also is uncertain. Either or both of the parties to the relation may die, the debt may be novated, and in various other ways, unnecessary here to be enumerated, the debt relation may be terminated or its legal character may be

<sup>1</sup> *Hannam v. Mockett* (1824) 2 B. & C. 934.

<sup>2</sup> *Keeble v. Hickeringill* (1809) 11 East 574.

changed. Notwithstanding the contingency, the relation is zygnotic.

Again, if *D* has a power of appointment at discretion to one or more of the heirs of *A* of land held in trust by *C*, there is the highest form of contingency in the power relation. There is no certainty that *D* at any time will exercise his power of appointment. Yet, *D*'s power is a legal relation; there is no contingency in his power; the only contingency is in his exercise of it. However, no one of the persons of the class in whose favor the power may be exercised, sustains any legal relation connected with the power. These persons have only a bare factual interest or possibility of becoming owners of the land. There is a practical distinction recognized by the law in the realization of a factual interest which depends on the activity of another person for the realization of such factual interest. Whether the owner of a decoy pond will act to obtain the wild fowl attracted to his pond, depends solely on the owner. The law regards that interest as something more than a bare possibility. But in the power of appointment illustration, the possible owners can not control the contingency.

**4. Kinds of contingency.**—The elements to which contingency attaches are the factors that create, alter, or extinguish jural relations. There are only two such elements—acts (the results flowing from human conduct) and events (all other jural occurrences). These acts or events are always connected with persons but the event or act is always the significant element for juristic consideration in connection with contingency. If the contingent fact is that *A* shall die leaving children surviving him, the survival of children is the fact of primary importance and their identity is secondary.

In a consideration of the contingency of acts and events, there also may be uncertainty (a) in the nature of the act or event, (b) in the place of the act or event, (c) in the manner of occurrence of the act or event, and (d) in the time of occurrence of the act or event. Of these forms of contingency, the last one is of chiefest importance—the time of occurrence of the act or event. Thus, if an estate is devised to *A* for life with

remainder to the eldest son of *B*, the chief factor of contingency is one of time. If *B* presently has no son, the remainder is purely contingent. The elements of the nature of the event (the birth of *B*'s son), of the manner of his birth (whether deformed or not), and of the place of his birth are already defined either by the will, by rules of law, or both, or are immaterial. The significant fact is the birth of *B*'s son before the termination of the life estate. If *B*'s son is born after the termination of the life estate, the remainder fails. The time element, therefore, is the chief one.

#### A. TEMPORAL CONTINGENCY

**5. Certainty and uncertainty.**—Contingency of time of acts or events as opposed to acts or events certain to happen at a fixed time (e. g., an eclipse) (*dies certus an et quando*) is of :

(1) Occurrences certain to happen at a time unknown. Example: death of a given human being (*dies certus an incertus quando*).

(2) Occurrences uncertain to happen at any time. Example: death of *A* leaving children surviving (*dies incertus an incertus quando*).

**6. Internal and external contingency.**—Contingency may affect a relation in two ways: (a) By an occurrence having an internal connection with the content (act) of a relation; (b) by an occurrence affecting a given relation from the outside. Whether a duty will be performed or whether a power will be exercised is a matter of internal contingency. Whether a condition precedent or subsequent shall be performed, or whether an event shall happen, is external contingency. Thus, the contingency that *B* has a son in the life-time of *A* may determine the disposition of a remainder in land.

The evolution or devolution of one relation may be a fact external to another relation. Thus, a tenant may owe a duty



not to commit waste. The breach of this duty (devolution) is a fact external to the creation of a nexal power to forfeit the lease. Before the devolution of the tenant's duty, the landlord's power was a mesonomic relation; it could not then be exercised but it could be assigned with the land as an accessory right. After devolution, the power became zygnomic.

Contingency, therefore, may exist, (a) as to the evolution of a jural relation; (b) as to the continued existence of a jural relation connected with an external fact (e. g., condition subsequent); and (c) as to a change in jural character of a relation (e. g., transformation of anomic relations to nomic relations and, in reverse, or transformation of mesonomic into zygnomic relations and in reverse).

**7. Simple and complex contingency.**—Simple contingency is contingency of occurrence of an act or event uncomplicated by reference to another act or event itself contingent. Examples: Will *A* live until 1950? Will *S* pay his debt when it is due? Will *D* exercise his power of appointment? Will *D* accept an offer already made to him?

Complex contingency is contingency of occurrence of an act or event by reference to another act or event itself contingent. The fact of reference may be an occurrence certain to happen at a time uncertain or an occurrence uncertain to happen at any time. Examples: Will *A* survive *B*? *A* devise to the child first born to *B*, an unmarried man. Remainder to *B* provided *B* marries *C*: two contingent facts, because marriage involves offer and acceptance. Will *B* accept an offer if *A* makes it?

**8. Lineal and collateral contingency.**—Lineal contingency is made up of factors which succeed each other in point of time. Lineal contingency may be simple or complex. Examples: Grant to *A* and his heirs until *B* comes back from a voyage and then to *C*; this is a conditional limitation and involves simple lineal contingency. Devise to *A* in fee with power to *B* to appoint in fee; this is a condition subsequent and also involves simple lineal contingency. Limitation to *A*, an unmarried man, for life,

remainder to *A*'s son by marriage to *B*; this is complex lineal contingency.

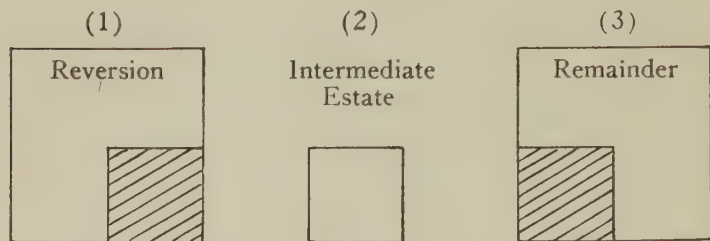
Collateral contingency is made up of coexisting factors, present or future, and the determination of one of these factors before the other. It is always complex. Examples: Limitation to *A* for life, remainder to *B* for life, and if *B* dies before *A*, remainder to *C* for life. As between *A* and *B*, the contingency is collateral and complex; if *B* dies before *A*, *B*'s estate never falls in; if *B* survives *A*, *B* takes the remainder and *C* takes nothing. As between *B* and *C* the contingency is also collateral and complex, since before *C* can take the remainder, *B* must predecease *A* and *C* must survive *A*.

**9. Vested and contingent remainders.**—The terminology for these ideas is not especially fortunate. All remainders are said to be estates in expectancy. A reversion, on the other hand, while commonly designated an estate in expectancy is not strictly in expectancy; it is a presently existing title which for the time being is incumbered; it is not a case, nor can it be, of something cut out of an estate later to be restored to its full compass; the true situation is one of conflicting rights where the original right is temporarily overshadowed by a later right; when the later right comes to an end, the conflict is removed, and the original right stands unincumbered.

Where a remainder is created, a particular estate is given or reserved to one person and at the same time an estate expectant in right of possession concerning the same res is given to another person. A remainder is never strictly an expectant estate; it is already an existing title even though purely contingent as to the person who is to enjoy it. A reversion also is an existing estate. The difference between a reversion and a remainder is simply in the nature of two kinds of conflicting rights. In a reversion, the original right is occluded or incumbered by a right later created, as for example where *A*, the owner of the fee, grants a term for years to *B*. Here the fee is incumbered (not cut up) by the term. In a remainder, the particular estate, so-called, is an incumbrance on the ultimate estate (the remainder). The remainder is not an estate in expectancy; it is a presently existing

estate subject to a present incumbrance, and in all cases it is subject to contingency of enjoyment, even in those cases where the remainder is denominated as 'vested.'

The juristic situation as to reversions and remainders may be illustrated by the following diagram.



[*Explanation:* The intermediate estate, whatever its compass, is an incumbrance upon ownership. In the case of reversion, the intermediate estate in point of time of enjoyment follows ownership. In the case of remainder, the intermediate estate in point of time of enjoyment precedes ownership. In both cases, the intermediate estate is a cloud on ownership. When the intermediate estate ends, this cloud on the ownership is removed. In neither case, is ownership in the slightest way diminished (cut down). The reversioner and the remainderman remain owners throughout].

There is still a further distinction which is purely a practical one based on the practise of conveyancing, that only one reversion is created where a lesser estate is created, while where a particular estate is created, more than one remainder can be, and often is, created. However, theoretically, and practically also, it could be otherwise. Where a lesser estate is created, the grantor might reserve to himself and to others a series of reversions upon the same terms as remainders are commonly created.

That the term 'vested' is purely an artificial one and depends on certain arbitrary rules is easily shown. If a term is granted to *A* for 999 years with remainder to *B* for life, *B*'s remainder

is said to be 'vested,' although clearly there is no possibility of *B*'s enjoyment of his estate except upon the contingency that *A* forfeits his term. The artificiality of the term is also shown by the somewhat curious fact that there may be a series of 'contingent' remainders followed by a 'vested' remainder. Whether the remainder is 'vested' or 'contingent' is in no way affected by contingency of enjoyment in possession.

A remainder is said to be 'vested' if the donee is in esse and is certain to come into possession *if* he lives long enough or *if* he would immediately come into possession upon a contingent determination of the particular estate. It is clear that a 'vested' remainder is just as contingent in enjoyment as a so-called contingent remainder. The rules governing the matter are purely feudal and have their basis in the external purpose of insuring the performance, as far as possible, of feudal services. There must always be an existing tenant for whose benefit a livery of seizin could be effected. Thus, an estate for years would not support a contingent freehold remainder. The artificial rules governing remainders did not apply to executory devises and they no longer fit the conditions of modern life.

In a word, the whole body of learning governing 'vested' and 'contingent' remainders lies apart from the idea of contingency in a theoretical sense. A 'vested' remainder juristically is always a contingent remainder and a 'contingent' remainder is always a vested remainder. This, of course, is not to deny that there are important legal differences.

By the feudal rule, the remainder must pass out of the grantor at the same time the particular estate is created. If the remainder was contingent, let us say because the donee was not in esse when the particular estate was created, who was the owner of the remainder? It had passed out of the grantor and the donee was not in esse. The feudal theory could give no better answer than that it was 'in gremio legis,' but there is no theoretical difficulty in supposing that the remainder was already vested in a juristic sense in the legal persona of the contingent and still unborn donee, subject to revert upon the non-happening of the contingency, to the grantor or some other person.

## B. FIELDS OF CONTINGENCY

Some of the chief fields in which contingency operates are set out in the following enumeration.

10. **Existing duties or powers.**—There is always contingency whether a given duty will be performed or a power exercised. The fact of contingency in these cases does not prevent the recognition of them as legal relations. This is true even though, for example, the duty be non-enforceable (e. g., executory promise of a minor) or that the power be merely preliminary to other legal relations (e. g., power to make an offer). If juralty were denied to duties and powers because of contingency, then all legal relations would become impossible. The real problem, however, is what line, if any, is drawn before a given act will be recognized as a duty or power. The short answer seems to be that once an interest is regarded as deserving of protection no line will be drawn against its protection because of contingency of realization of the interest in individual cases, although if, in general, an interest could not be protected because duties would be generally disregarded or powers be generally not exigible, the policy of the law would wisely refrain from attempting the impossible. For example, if promises were generally disregarded or certain kinds of trespasses were practically inevitable, the law would find the burden of protection too difficult for practical realization.

Where the law recognizes given duties and powers they are protected not only as against the servi of these relations, but the relations themselves are protected as distinct legal interests against unjustifiable interference by third persons. Thus, it is a matter of contingency whether *A* will carry out his promise to *B*, yet *C* may not by fraud determine the contingency against *B* by causing *A* to move contrary to his duty.

Where a duty is created by contract and is broken, the value of the duty will be measured if possible even where the value at the time of breach depends on contingency. Thus, where a whaling master is wrongfully discharged, he may recover his share of the profits of the voyage.<sup>3</sup>

<sup>3</sup> *Dennis v. Maxfield* (1865) 10 Allen (Mass.) 138.



11. **Appurtenant power of gain.**—This contingency of gain presents itself in two chief forms: (a) Gains appurtenant to a business requiring acts of the public; (b) gains appurtenant to ownership of a thing requiring acts of the owner for the realization of the gain. In both of these cases, the contingency may be very great, but yet the law affords protection of the prospective gain if there is any measure by which the probability of gain can be reasonably estimated. What is contingent is treated as certain to happen if there is a measure of experience and if the loss is not too remote. Thus, if a tenant is wrongfully ejected from premises by his landlord, the tenant may recover for loss of profits based on the experience of the business. But if a fisherman sues because of damage done to a fishing net, he may not recover for loss of profits.<sup>4</sup>

Appurtenant powers of gain when connected with a business enterprise are also protected against unfair competition, infringement of trade marks, and defamation of goods. <sup>s</sup>

12. **Non-appurtenant power of gain.**—Where a contingency of gain is not connected with a contract duty, or a business, profession, or occupation, or with land or chattels, and requires an act to realize the gain, the contingency as a rule has no protection. A hunter has no protection in his contingency of capturing wild game, but if he succeeds in depriving a wild animal of its natural power of escape and continues the pursuit, he will be protected as owner against another who first takes the animal.<sup>5</sup> The Roman law rule was stricter, requiring actual detention of the animal before ownership was created. Where fish are partially inclosed in a mechanical net, on the contrary, it has been held to be larceny to take the fish, even though there remained the contingency that the identical fish taken might have escaped.<sup>6</sup> Likewise, disturbing fish partially inclosed in a net operated by hand is an infringement, not of a right of ownership in the fish, but is a breach of duty not to interfere with a power of gain.<sup>7</sup>

<sup>4</sup> *Wright v. Mulvaney* (1890) 78 Wis. 89.

<sup>5</sup> *Pierson v. Post* (1805) 3 Caines (N. Y.) 175, 2 Am. Dec. 264.

<sup>6</sup> *State v. Shaw* (1902) 67 Ohio St. 157, 65 N. E. 875, 60 L. R. A. 481.

<sup>7</sup> *Young v. Hichens* (1844) 6 Q. B. 606.

The distinctions in these cases are based on the practical proximate-ness of control. That power of control may be either ownership or the right to become owner.

**13. Grants of future contingent enjoyment.**—This field is chiefly occupied by ‘vested’ and ‘contingent’ remainders and executory devises. They create actual legal relations, but there are differences in the collateral legal relations that arise with them. A ‘vested’ remainder may be devised, granted, or limited over, and it may be made the basis of ‘contingent’ remainders and trusts. Contingent remainders not involving uncertainty in the identity of the donee may now be assigned or devised, but a contingent remainderman may not at common law, however, have a remedy to protect his interest before the contingency happens.

The contingency of actual enjoyment of the estate in these instances may be very great, but yet the law allows the creation of present estates contingent in enjoyment limited only by the rules against remoteness because they flow from a pre-existing right of ownership. There is an evident distinction between the creation of a new and underived right of ownership based on contingency and a right of ownership derived from a pre-existing right of ownership based on contingency of enjoyment. One can not ordinarily become the owner of fish in the sea until he overcomes the contingency of capturing them. There is nothing here to be assigned or devised; in all respects the relation of a person to any *res nullius* is practically without legal significance, since each person has a simple power to become owner if he can. There would obviously be no need of permitting a power of assignment or of devise in such a case, because each one already has all that could be assigned or devised.

Going a step farther, a right of entry upon a condition subsequent which has not yet happened, or a possibility of reverter, are descendible but they may not be assigned. Whatever may be the underlying reason (various reasons are given) for the policy of the law in these cases, the situation is a different one from that presented by a contingent remainder. A contingent remainder moves forward from a pre-existing ownership. It is something that the pre-existing owner creates for the benefit of another.

But a power of entry for condition broken, or a possibility of reverter, is a legal advantage which an owner creates for himself or which the law creates for him; it is retrospective in operation as against the owner of the existing estate. The variance of rule corresponds with a variance in the jural situation; there is a practical difference sufficient to account for the difference in the rules.

**14. Reversionary interests.**—These interests have already been partially discussed. Reversionary interests are of two classes: (a) Interests based on contingency (e. g., possibility of reverter); (b) interests not based on contingency. A landlord's reversion may be contingent or non-contingent. If there is a term of years, the reversion is not contingent, but if the term is for an uncertain period (e. g., life of the tenant or at will), it is based on a contingency. The term 'reversion' here is apt to be somewhat misleading. What accurately is meant by 'reversion' is not that some legal estate 'reverts' or goes back to the landlord, but that an incumbrance on the landlord's ownership ceases. The landlord's ownership was not diminished (cut down) by the term, nor was it enlarged by the ending of the term. It remains throughout the same ownership but its jural character has been altered. Where a possibility of reverter is realized, there is accurately a reversion (going back) of the title to the grantor or to his heirs.

**15. Future contract rights.**—Interests resting on the performance of promises form one of the most important fields of contingency. Where a promise is made there is contingency of performance, but if the promise meets the positive and negative tests of what constitutes a valid contract, there is no restriction on what may be turned into a promissory legal relation. It is easy to see why contingency is admissible in these cases; promises are in effect only exchanges of deferred economic advantages. Modern economic life could not dispense with this institution. All jural relations without exception, and most conspicuously those involving an appreciable element of time, are based on contingency of evolution (internal contingency).

Promissory obligations also may be based on external contingency. Promises may be made contingent:

(a) Upon the performance of another's naked promise (anomic relation). Example: *A* makes a promise to *B* contingent on *C*'s promise to make a gift to *A*.

(b) Upon another's unenforceable promise (mesonomic relation). Example: *A* makes a promise to *B* contingent on *C*'s payment to *A* of a debt barred by limitation.

(c) Upon another's enforceable promise (zygnomic relation). Example: *A* makes a promise to *B* contingent on *C*'s payment of his debt to *A*.

(d) Upon an event uncertain to happen. Example: *A*'s promise to *B* contingent on *C*'s return from Paris.

(e) Upon an act (not a part of the promise) uncertain to happen. Example: *A*'s promise to *B* contingent on *C*'s approval.

From the standpoint of legal rules, these instances present no practical difficulty. Unless other affirmative elements are intruded, there is no reason to doubt that in each of them, upon the happening of the contingency, the duty of performance will be complete. These instances, however, show the effect of contingency in giving jural character to legal relations. Since the duty in each of these cases is contingent upon an external act or event wholly uncertain to occur, the jural relations are mesonomic. They are not converted into zygnomic relations until the contingency happens. Internal contingency does not affect the character of jural relations.

Future contract rights exceptionally also may be assigned. For example, wages to be earned in the future in an existing employment determinable at will may be assigned. The rationale of this rule is analogous to the rule of the sale of a potential interest.<sup>8</sup> The wage earner already has a potential factual interest in the future wages, although this interest is now contingent in enjoyment. A similar assignment of future wages under a future

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<sup>8</sup> *Grantham v. Hawley* (1616) Hobart 132.

employment would be invalid. The basis of these rules lies solely in the proximateness of realization of an expectancy. The problem here is not one of juristic logic but of practical expediency. In general, courts of law do not favor transactions based on external contingency. Courts of equity, on the contrary, favor contingent transactions and leave to parties the widest freedom in the making of agreements based on contingent interests. This is practically effected by means of a bold but convenient fiction. An equitable 'assignment' so-called creates an equitable right, especially in security transactions.<sup>9</sup>

There is no analytical difficulty in dealing with a potential interest as a thing to be assigned or mortgaged. If an owner of land mortgages a crop to be raised on his land from seed not yet planted or even bought, there is already a potentiality which is an ideal thing. If seed is planted and is already germinating, the nature of the thing has not yet changed—it is still an ideal thing and it remains such until the occurrence of a condition precedent, the development of something that meets the description of the potentiality in economic realization, when the ideality of the thing is transformed into a material object. In general, the law does not favor a dealing with potentialities unless connected with a material object through which the potentiality may be realized in economic form, and the preponderance of judicial view requires even something more than that—a physical connection with a material object that will in the course of nature produce an economic result. The difficulty of dealing with potential interests either by contract or as things to be sold is not one of logic but of practice. There are clear reasons why there are exceptions in contract law to the general rule and a benevolent liberality in equity as against the restrictions at law in dealing with contingent interests that ripen into material objects. The chief reason is this: the rule of bona fide purchaser for value is not in general applied to chattels. It would be highly disturbing to society if a new element of insecurity were introduced in dealings concerning chattels. Such uncertainties threaten everyone and the law refuses the stamp of jural relationship to

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<sup>9</sup> *Holroyd v. Marshall* (1862) 10 H. L. Cas. 191.



such situations involving contingency, not in any sense because of contingency itself, but because of the legal effects that would flow in the distribution of legal relations affecting, as a rule, many other persons. In contract rights and equitable rights, on the contrary, only two persons are directly concerned with the contingency of the transaction, and where third persons are also concerned, the element of want of notice is a sufficient safeguard against the uncertainty introduced by contingent transactions. The resulting distinctions, therefore, are like a parallelogram of forces; they are the direct product of other legal rules; and the result tends to be one which protects the security of commercial dealing.

16. **Future gains conditioned on the act of another.**—Any person may entertain the hope of being the donee of a gift *inter vivos* or under a will. Such an expectancy, however proximate but yet falling short of an actual offer or a will followed by death, is not a legal interest. It may, however, be the basis of an equitable 'assignment.' There is a general tendency to deny legal relationship to factual relations not admitted as contractual, where realization depends on the act of another. Expectancies dependent on acts of another are comparable in idea to an independent intervening cause in civil and criminal liability. A human intervention causes a break in the causal chain and results in the negation of liability. An expectancy dependent on a human intervener negatives the creation of a legal interest. This has been carried to the extent of denying liability of a third person who interferes with such an expectancy; thus, if a third person induces the testator to alter his will in favor of a given beneficiary, it has been held that there is no liability. The question here again is one of legal policy and not of juristic logic. Juristically there is no reason why an expectancy of this kind may not be assigned and protected from unjustifiable interference in the same way that a future crop may be assigned. The chief practical difficulty lies in the uncertainty introduced by the recognition of such interests. If unjustifiable interference in such instances were made actionable, what certain measure of damages could be applied? The question suggests not an

addition to the law of assignable expectancies or a change in the rule of damages, but rather a supplement to the scope of *qui tam* actions which in modern law have taken the place of the '*actiones famosae*' of Roman law.

17. **Future property rights dependent on events.**—Property rights created by grant and contingent in economic realization on acts or events have already been touched upon. We consider now similar rights contingent on events. The instance of potentialities, which under divergent applications in their scope have found legal recognition, has been briefly noticed. It is clear that contingency of realization of an interest dependent on an event is not in legal policy objectionable. Two instances similar in contingency but variant in legal result may here be considered as typical examples. These instances are inchoate dower and expectant heirship.

Inchoate expectancy of dower presents complex collateral contingency—the contingency that the husband will die leaving his wife surviving. The contingency is double. The wife or the husband may die first. Put in the form 'the husband shall die leaving his wife surviving,' it is seen to be the highest form of contingency. If the wife predeceases the husband, no interest passes to her heirs. In the life of her husband, she may not make an assignment of her interest. The husband can effectually convey the land in the life of the wife, and if the wife predeceases the husband, the grantee's interest will stand unburdened.

The prospective heir will become '*heres verus*' if he lives longer than his father. Here also there is complex collateral contingency.

The two cases are identical in contingency but different in legal result. There can be no doubt that expectant dower is a present legal interest. There must be a release of inchoate expectancy of dower to escape the contingency of its becoming realized or vested as an interest in land. It may be noticed at this point that inchoate expectancy of dower is an entirely different right from the right of dower. Inchoate expectancy of dower is not directly an interest in land. This expectancy is protected by remedies against fraud. When the expectancy of dower is realized, an entirely new jural relation arises.

The prospective heir, on the contrary, while standing in precisely the same degree of contingency to the realization of his expectancy as the wife of a landowner, has no present legal interest. This variance in legal result is not, therefore, due to any difference in the logical structure of two factual relations, but rests on the accidents of legal history and the dictates of policy. Before the Norman conquest lands were devisable, but dower was unknown in Saxon times. With the introduction of the feudal system, restrictions were imposed on the power of devising lands so that in general no will was permitted until the reign of Henry VIII. At one period of our legal history, the son needed no protection since necessarily the inheritance would fall to him if he survived. With power of free alienation by will in modern times, the son's interest has ceased to be protected either directly (as by the *légitime* of Roman law countries) or indirectly as by withdrawal of the power of devise. The expectant heir's interest is not one that can be assigned and in Roman law a contract made by an heir apparent to convey his inheritance was void.<sup>10</sup>

**18. Meaning of the terms 'possibility,' 'inchoate' right, and 'vested' right.**—We have seen that there are two forms of contingency—internal contingency and external contingency. Internal contingency (i. e., of evolution) is a characteristic of all jural relations. External contingency attaches to jural relations whose economic realization depends on an act or event collateral to such jural relations. This distinction furnishes the key for the proper distribution of terms to denote the existence or absence of contingency.

*Possibilities.* Usage here is not uniform. There are two applications in current speech: (a) That a 'possibility' is a relation of fact which may be followed by a jural relation. Thus, it is possible that *A* may make a gift to *B*. Again, it is possible that *C* may make a contract with *D*. In these instances, there is no present legal relation, but there are anomic relations which by chance may ripen into nomic relations. No degree of probability or practical certainty that *A* will make a gift to *B*, creates in *B*

<sup>10</sup> C. 2.3.30; D. 28.6.2.2; Ent. d. RG. in *Civilsachen* IV 36.

any legal interest either in the hope of the gift or in the object of the gift. No degree of probability that *C* will make a contract with *D* creates a contractual relation or even a legal interest in the expectation of a contract.

(b) Sometimes the term 'possibility' is applied to an actual legal relation which involves a high degree of external contingency. Coke stated as an established maxim that no possibility, right, or thing not in possession or vested in right could be granted or assigned.<sup>11</sup> Examples of this usage are possibilities of reverter and powers to defeat a freehold granted to another upon failure to perform a condition.

It is impossible to harmonize these different applications or to construct a logical concept of 'possibility' based upon them. It is believed that the preferable solution is to restrict the application to the first usage—an expectation not recognized as a legal interest. In that sense, a 'possibility' of reverter is something more than a 'possibility'; it is a present legal claim but a contingent one. It would be desirable to denominate it simply as a right of reverter.

*Inchoate rights.* Inchoate rights are contingent legal relations based on an expectancy. A prospective heir has an expectancy but his hope is not recognized as a legal relation. A wife has an expectancy of outliving her husband and taking a dower interest in his land. This expectancy is a legal interest. The power to make an offer is not an inchoate right of contract. This power is not an expectancy and there is no external contingency connected with it. Likewise, the power to accept an offer is not an inchoate contract. Here, again, the power is not subject to external contingency. Going a step farther, a contract relation is not an inchoate right; it is not an expectancy of a contract but is already a contract. It may be said, perhaps, that there is an expectancy of economic enjoyment of the performance of the contract, e. g., the payment of money. There is no doubt such an expectancy from a lay point of view, yet, from a juristic standpoint, the claim to a performance is not an 'expectancy' of the performance but the right to have it. The wife's expectancy

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<sup>11</sup> 10 Co. Lit. 265a, note 212.

of dower is not a claim to dower but a claim against interference with the hope of getting it. The power to commit a tort is not an inchoate claim in another to have compensation; nor is the power to violate a contract duty an inchoate claim to damages. The hope of gaining a crop after planting seed is not an inchoate right to the crop but the hope itself is an inchoate right.

The term 'inchoate' as applied to rights is one of considerable difficulty. The dower illustration may again be employed to demonstrate the point. There are three possible views of the matter:

(1) That the wife of a living husband has only an expectancy of dower; that there is no dower right (i. e., no claim to an interest in land based on a contingency); that, accordingly, there is no inchoate right of dower; but that the expectancy of dower is an inchoate right simply because it is an expectancy only (i. e., an interest not realized).

(2) That the expectancy of dower and the contingent interest of dower are two distinct rights; that the hope of dower is one right (a complete right since a hope can not be more complete than itself and since the existence of the hope is not based on contingency), and that right of dower based on contingency is another distinct right; that the *hope* of dower is not inchoate but that the contingent *right* of dower is inchoate.

(3) That the expectancy of dower and the contingent right of dower are not two legal relations but only one legal relation; and that this single contingent right is an inchoate right.

Of these three views, the first seems to be the correct one. When the wife in the lifetime of her husband 'releases her dower,' she releases simply the expectancy of getting dower; she can not presently release the dower itself.

There does not seem to be any clearly defined or accepted meaning of the term 'inchoate.' Various meanings are possible. The idea back of the term is a legal interest (i. e., not a mere possibility) as yet unrealized and depending for its realization on external contingency. This natural signification is easily understood and it would be convenient in application.



*Illustrations of the application of the term 'inchoate.'* If money is due under a contract, there is no inchoate right in the money. Payment may be made in any form of legal tender, and there can be no present legal interest in any particular coins or other form of money. Even if the duty is to transfer title to ascertained goods, there is no present legal interest in the goods. The element of contingency (of performance) is present, but it is an internal contingency and there is also wanting a present legal interest in the result of the performance.

Inchoate rights are not 'incomplete rights.' Sometimes a right may not be assignable, or devisable, or inheritable, or leviable. Expectancy of dower has all of these negative qualities, and yet it is a complete, though inchoate, right; it is a present legal interest which is not yet fully realized in its economic or legal definition; and it is subject to complex external contingency. Expectant dower is a complete right, as much so as the right of dower. Expectant dower is not an incompleting ownership; indeed, it is not ownership at all of any legal interest in land. Even the absence of enjoyment of the use of a thing is not a mark of an inchoate right. If it were otherwise, then a landlord or a pledgor would have only inchoate rights of ownership.

Other instances of inchoate rights are power of re-entry before condition broken, 'lucrum cessans' (future gains), hope of a future crop, expectancy of future wages in a determinable present employment, right of reverter, expectancy of homestead, unenforceable promises, and dependent concurrent promises. For example, the executory promise of a minor is not enforceable unless he ratifies after majority. The full economic and legal value of the promise as promise is not realized until an act, externally contingent (ratification after majority) occurs.

The limits of the present use of the term are realization in legal or economic scope of a legal interest on one side and the absence of a present legal interest on the other side. All that falls between belongs to the field of inchoate rights. An inchoate right, therefore, implies a present right which in its description defines a legal relation into which upon external contingency it merges by way of substitution. Juristically, inchoate rights are

regenerable relations; they are, therefore, always mesonomic relations.

In a more limited sense, an inchoate right is a present legal interest not yet realized in its definitional form and dependent for such realization upon the occurrence of an *event*. This usage excludes all contingent *acts*.

*Vested rights.* The term 'vested' is commonly opposed to 'contingent' or to 'inchoate,' and sometimes it is opposed to a 'possibility.' It is not yet a term of juristic art; it lacks scientific precision. It hardly needs to be remarked that all rights are vested in the sense that they exist. A contingent remainder<sup>12</sup> is a 'vested' right, and we have seen that a 'vested' remainder may be contingent in enjoyment. Since the term is not one that qualifies the present existence of rights, it seems proper to limit its application in a juristic sense in opposition to the term 'inchoate' as already defined. This usage would not, however, be applicable to so-called 'vested' remainders where the meaning rests on purely artificial rules of land law. The great bulk of vested rights do not have inchoate forms; nor do vested rights depend on the power of present enjoyment. For example, a reversionary interest in land does not have an inchoate form, nor can the corpus of the interest be presently enjoyed.

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<sup>12</sup> It is not within the scope of the present discussion to attempt an analysis of contingent remainders and it will be sufficient to suggest the possibility of two theories: (1) That ownership (the remainder) is vested (exists) in the so-called remainderman. The prevailing view is that the grantor has parted with the fee. (2) Another possible view is that the grant has not created in the contingent remainderman a direct interest (estate) in land but only an inchoate expectancy of such an interest. According to the latter view, the grantor still remains owner and is subject to be divested upon the happening of the contingency.

For various reasons the latter theory is the preferable one. For example it obviates the necessity of resort to an explanation of plural ownership where there are successive contingent remainders. That juristic difficulty, the solution of which can be only briefly touched upon here, is that a right can have only one owner and that there can be only one residual ownership of one thing. Where, for example, there are two contingent ownerships, as where *B* and *C* are contingent remaindermen upon successive contingencies, *B* and *C*, as representatives of two distinct legal personæ, constitute, by the fact of coincident ownership of the same thing, a distinct new persona, so that there is now only one owner, the persona *X*. The respective rights of *B* and *C* inter se are worked out according to the nature of the contingency in the same manner as are the rights of stockholders or the rights of common or joint tenants.

## C. SUMMARY

The foregoing discussion may be summarized in the following propositions:

1. Contingency as such is not a test of juralty. All legal relations without exception are subject to internal contingency (i. e., evolution).

2. Whether a factual relation will be elevated to the place of a jural relationship and whether a jural relation is a mesonomic relation or a zygnomic relation are determined by external contingency (i. e., an act or event external to the given relation).

3. Whether a bare factual interest is regarded as the basis of a legal relation, depends in general on the power of control in the holder of the interest of the economic realization of the interest. The question is one of practical proximateness of control.

4. If a legal relation is admitted, no extent of contingency in its evolution or in the realization of the economic advantage which it protects justifies external interference with it by socially unfair acts.

5. In polarized jural relations unlimited scope is allowed in the creation of promissory obligations based on external contingency, and in equity by the fiction of 'equitable assignment' similar scope is allowed to effect the transfer of contingent factual interests after the contingency occurs.

6. A vested legal relation, if assignable, can be assigned with unlimited contingency subject only to the rules governing remoteness.

7. Rarely, absolute uncertainty not affected by any power of control in the dominus of a factual interest is made the basis of a legal relation on grounds of public policy (e. g., expectant dower and homestead).

8. The rule of proximateness of control which expresses the

individual interest is dominated by the social principle of security of transactions in factual interests contingent in economic realization.

9. All jural relations which are affected by external contingency in their constraining force are mesonomic, and those jural relations not affected by external contingency in their constraining force are zygnomic. Thus, all inchoate rights are mesonomic relations.<sup>13</sup>

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<sup>13</sup> The scope of mesonomic relations, of course, is broader than that of inchoate rights.

## CHAPTER XV

### ATTRIBUTION OF PHYSICAL QUALITIES TO LEGAL RELATIONS

1. Objective and subjective aspects of legal relations.
2. Qualities of matter and of form.
3. Creatibility of legal relations.
4. Alterability of legal relations.
5. Source of the character of legal relations.
6. Alteration without destruction.
7. The metaphor of 'transfer.'
8. Internal and external alterations.
9. Destructibility of legal relations.
10. Position of legal relations in space.
11. The objective theory is inadequate.
12. The conceptual view.
13. The sovereign functions with legal relations through the government.
14. Advantages of the conceptual theory.
15. The same investitive facts may generate plural legal relations.
16. The sovereign gives and applies only his own law.
17. Immobility of legal relations.
18. Partibility of legal relations.
19. Conclusion.

#### 1. Objective and subjective aspects of legal relations.—

A legal relation may be regarded from two points of view—objectively and subjectively.

Objectively, a legal relation consists of the physical and social elements, perceptible to the senses. The principal objective elements of a legal relation are two human beings, a politically organized society of human beings, certain investitive facts, and the literary sources of the law which regulates the physical conduct of one of the two persons.

Subjectively, a legal relation is the concept of these various elements formulated in a conceptual limitation of the personality <sup>1</sup>

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<sup>1</sup>Jural personality is the sum total of the legal rights (claims and powers) and ligations (duties and liabilities) of a person.



of one person <sup>2</sup> and the enlargement of the jural personality of another.

Superficially, it does not seem necessary to attempt any discrimination between the objective and the subjective, but the distinction lies at the base of legal thinking and is the cause of some of the sharpest and profoundest conflicts of legal theory. It will be sufficient for the present purpose without considering the problem of the function of the objective and the subjective as a whole, to say that the view adopted here is that a legal relation is a pure concept abstracted from physical elements and that the law in its juridical function never deals with objects but only with concepts.

**2. Qualities of matter and of form.**—While a legal relation is a pure concept, it often is dealt with in legal analysis as if it had the qualities of matter or of form. These attributed qualities are:

I	II
Creatibility	Position
Alterability	Mobility
Destructibility	Partibility

We shall discuss each of these attributed qualities in the order given and shall attempt to show that the attribution to legal relations of qualities of creatibility, alterability, and destructibility is permissible and necessary in legal reasoning, but that the attribution to legal relations of the qualities of position, mobility, and partibility is erroneous.

**3. Creatibility of legal relations.**—We are not attempting in this discussion to deal with Platonic ideas or any other metaphysical problem. We are concerned here only with the concept of actual legal relations. From this practical point of view,

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<sup>2</sup> A legal person ('persona') is an entity to which the law attributes a capacity for legal rights or ligations. 'Persona' is purely a concept and is not to be identified with 'homo.' The substrate of 'persona' may be a human being, a collection of human beings, a succession of human beings, a physical object, or an immaterial thing (e. g., a fund or a complex of legal relations).

there is no problem. Actual legal relations do not exist until certain investitive facts bring them into existence. We may say, therefore, that all legal relations are created.

4. **Alterability of legal relations.**—On first impression, it would seem that if a legal relation can not have the qualities of position in space, of mobility and transferability, or of partibility, that it also can not be altered. We believe, however, that view is incorrect.

5. **Source of the character of legal relations.**—A legal relation gets its character in two ways: (1) by its internal nature and (2) through its connection or factual relation to other legal relations. Thus the right to physical security of land is an unpolarized (in rem) right. If the owner grants an easement of way to *A*, it still remains an unpolarized right. It would remain an unpolarized right if the owner gave a license to enter, to every person in the world but one individual known to the owner. It would in the instance last put be an unpolarized right even if we limit the right to a claim against trespasses. The claim against trespass would, however, be extinguished if the last person also got a license to enter; but other unpolarized claims would remain. It appears, therefore, that an unpolarized claim does not change its internal nature in respect to polarization.<sup>3</sup>

An illustration will now be put of a legal relation that gets its character externally. If a debt is barred by limitation, it changes character through the fact of the coming into existence of other legal relations. It is reduced from the level of a perfectly enforceable claim to that of a not perfectly enforceable claim. The claim to require the payment of the debt survives notwithstanding the flow of time, but the debtor is armed with a power to defeat an action. The external fact here of the flow of time and the coming into existence of the debtor's power to plead the statute, affect the character of the creditor's claim.

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<sup>3</sup> Unless it also changes in jural character. There are instances of unpolarized mesonomic relations which become polarized by regeneration.

6. **Alteration without destruction.**—It may be objected that since a legal relation is a concept there can be no alteration of the concept without a destruction of it. This does not follow. There may, for example, be a concept of a chair, but it is possible to take away, add, or substitute practical elements in the concept without destroying the concept. There is a point, however, beyond which we can not go. The extent of alteration to which a concept submits can not be measured quantitatively. It depends on a qualitative standard of function. Thus if the concept of a chair is so far altered that what is left will not function as a concept of chair, then the limit has been exceeded. Jural concepts submit of a much wider range of modification than general concepts. If each change affecting a legal relation either internally or externally must be regarded as creating a new legal relation, the world of jural phenomena would be in a condition of anarchic flux. Certainly no technical good would be gained by such an assumption and our legal concepts would be difficult to manipulate because of infinite complexity.

Acceptance of the view that a concept or a legal relation may be altered without destroying it, does not, however, require an admission that a concept or a legal relation may be divided. There may be a concept of half a chair, a chair cut into two parts, equal or unequal, but the concept itself, whether of a chair or of half a chair, can not be divided.

7. **The metaphor of 'transfer.'**—In various respects the actual jural situation does not seem to be what has been commonly supposed. To some extent, the view here exposed involves somewhat more complexity than the traditional view, but it may be insisted that the result is inescapable. For example, the traditional view that a conveyance in some manner translates a legal relation from one person to another as if it were an object to be moved about, is no doubt a simpler idea than that of the destruction and creation of legal relations. The metaphor of 'transfer' may be convenient and in the greater number of instances not harmful, but if there are instances where the actual juridical results or the needs of justice do not square with such a theory, then it must be reformed to agree with the facts. We

therefore insist upon juristic refinement only so far as the need appears for better scientific results.

8. **Internal and external alterations.**—We now proceed to show by various examples how internal or external alterations of legal relations do not affect their integral character.

(1) *Partial payment.* Where a partial payment is made on a debt, does the partial payment operate to split the old debt into two parts, one of which is discharged and the other of which remains? That is not the view the law takes of the matter. The old legal relation remains, but it has been altered by the partial payment.

(2) *Successive performances.* Where there is a contract for a succession of performances is there one legal relation where each performance successively alters the relation, or does each performance end a legal relation?

(3) *Progressive performances.* Where there is a contract to produce a result which is made up of a multiplicity of physical acts, does each physical motion in the direction of performance mark an end of a legal relation, or does progressive performance alter the legal relation? If a building contractor has agreed to build a house, payment to be made upon completion of the work, does the laying of each brick and insertion of each nail, amount to performance? Are there as many legal relations as there are physical acts of performance?<sup>4</sup> That would be a difficult and inconvenient assumption. Performance, in the case put, can only be accomplished by substantially producing the result contracted for, and it would seem that the various physical acts do not mark definitive stages in a legal relation, much less the termini of a multiplicity of legal relations, but operate as progressive alterations (in the case last put) of one legal relation. There is proof of alteration, since, in various contingencies, there may be a recovery for work done falling short of complete performance. But where a building contract is divided into stages of

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<sup>4</sup> Cf. Terry "Leading Principles of Anglo-American Law" pp. 160, 163, 533.

performance of work on one side and payment on the other, then there are distinct legal relations in which the physical acts leading up to the end of these stages (whether measured by time or result) operate to alter these separate legal relations.

(4) *Easements*. Ownership is alterable. If the owner grants an easement of way to *A*, the owner is still owner. The effect of the grant is either (1) to extinguish the owner's claim against *A* requiring *A* not to trespass on the land in the way which the easement permits, or (2) the easement effects a modification of the owner's claim (as against *A*)<sup>5</sup> not to trespass generally. Since land has an integral identity according to its legal description, it would be inconvenient to attempt to multiply unpolarized claims against trespasses by positing as many such claims against each person as there are possible physical divisions of the land. We, therefore, assume the second view is the correct one, and that the owner's claim as against *A* has been modified only.<sup>6</sup>

(5) *Extension of time*. Where a contract is made extending the time of a performance, has the legal relation represented by the performance been extinguished to be replaced by a new legal relation incorporating the extension, or has the original legal relation been modified? On principle, the latter view is the more convenient one. This selection may be put on the ground that performance is the substantial thing. The time of performance may be essential, but time can not stand alone. Performance is what gives the legal relation not only its material content, but also its practical meaning. An extension agreement

<sup>5</sup> Cf. *Hohfeld* "Fundamental Legal Conceptions" Yale L. Jour. 26: 710 (740 sq.).

<sup>6</sup> This problem raises a very interesting question as to the nature of the legal relations after the grant of easement by *O* to *A*. If *O*'s claim as against *A* has not been extinguished, if, in other words, *O* still has a claim against *A* not to trespass on the land and if, by virtue of the grant, *A* has a privilege of entering, how is the apparent logical difficulty avoided? The illustration indicates the capital importance of the distinction between *zygnomic* and *mesonomic* relations. Without that distinction, we are unavoidably driven either into an inconvenient solution of supposing a destruction of rights upon the grant of an easement or into a logical contradiction. For consideration of an analogous problem, see *Bigelow and Madden* "Exception and Reservation of Easements" (1924) Harv. L. Rev. 38:180.



may operate to create an independent legal relation (i. e., a covenant not to sue) and it may also operate to modify an existing legal relation.<sup>7</sup>

**9. Destructibility of legal relations.**—The problem of destructibility of legal relations need not detain us long. Legal relations come into existence and they also go out of existence. Legal relations are always an attribute of a persona (legal person). Ordinarily, legal relations do not attach before the birth of physical persons and ordinarily they do not survive the death of physical persons; but there are exceptions in both cases since legal personateness does not always coincide with physical personateness. The rights of heirs and executors are not transmitted rights, but are newly created rights. Whatever rights the defunctus had, ended when his legal person ceased to exist.

**10. Position of legal relations in space.**—If *A* in state *x* owes *B* in state *y* a performance in state *z*, where does the legal relation exist? Again, if *A* of state *x* by an agent in state *y* has converted a chattel in the latter state owned by *B* of state *z*, where does the ensuing legal relation exist? Again, if *A* domiciled in state *x* commits a battery on *B* domiciled in state *y* while *A* and *B* are residing on a desert island, *z*, assuming that a legal relation exists, i. e., to pay compensation, where does it exist? In these cases, on the assumption that a legal relation exists, does the legal relation have a position in space?

**11. The objective theory is inadequate.**—From the objective point of view, a legal relation has extension and may be said to exist where the objective elements are found. Since law proceeds from the idea of sovereignty and since a state in modern times is sovereign over a definite territory, no question ordinarily arises (except as to the local jurisdiction of courts) when all the objective elements are found in the same state. But where

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<sup>7</sup> Thus in *Morgan v. Butterfield* (1855) 3 Mich. 615, where there was an extension of the time for performance, it was held that the proper plea is in bar and not in abatement. See *Millar* "The Manner of Pleading Premature Action at Common Law" (1924) Ill. L. Rev. 19:115. Another demonstration of alterability is shown by *Aetna Life Ins. Co. v. Dunken* (1925) 266 U. S. 389, 69 L. ed. 342.

the objective elements are dispersed over two or more states, a complete legal relation does not exist in any one state, which is the same thing as saying that a legal relation does not exist at all in such a case. It is not possible to conceive that a state can deal with a partial legal relation. Legal relations are atomic. Like other atoms, the elements of legal relations are separable into their protons and electrons, but the courts do not deal with these ultimate elements, but stop short at the atomic structure. Courts deal always with complete legal relations. The objective theory is, therefore, clearly unworkable. It does not submit of any consistent theoretical elaboration although it is in the language of the courts the favored hypothesis.

**12. The conceptual view.**—If now we take the conceptual angle of approach, where does the legal relation exist, whose objective elements are dispersed over two or more states? The answer to this question is the same answer that must be given to the question, Where does a concept exist? That answer seems to be plain enough—a concept can have no unique position in space; it is not even clear that it has any spatial limits, or, indeed, any connection with space at all. We hasten, however, to interpose that our object is not to deal here with metaphysical problems. The law is a practical science and the solution of the question before us must be put on ground that is free from speculative reasoning. That a legal relation considered as a concept has no unique position in space may be accepted in practical reasoning when once the unavoidable novelty is made familiar that juridical law is entirely a matter of concepts and not of material objects.

**13. The sovereign functions with legal relations through the government.**—When it is said that a legal relation as a concept has no unique position in space, our first question is perhaps already answered.<sup>8</sup> The question remains, how does the

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<sup>8</sup> Cf. *Roguin* "La Règle de droit" (Lausanne 1889) chap. iii: "De l'assiette de l'impôt:" "le lien juridique est en lui-même quelque chose d'immaterial qui ne saurait avoir proprement d'emplacement physique  
\* \* \* ."

sovereign (the legal concept of juridical ultimateness in a given territory) function with legal relations?

There is an evident distinction between a concept and the conceiving process. For practical purposes, we need not trouble ourselves about the position of a concept if we know where the conceiving process is. The concept for practical purposes may be assigned the same position as the conceiving process, although from a metaphysical point of view there can be no assurance of the truth of that assumption.

But another difficulty remains. If the sovereign is a concept<sup>9</sup> and if legal rules are only hypothetical concepts,<sup>10</sup> it follows (1) that legal relations are only hypothetical concepts, and (2) that there is no causal connection between the sovereign (a concept) and the concept of legal relations. Since, however, we can have no assurance of the connection of concepts and the conceiving process; since, in other words, we do not know whether the ideas of the physiological brain are related to the brain by causal connection, by parallelism, by participation, by reflection from another source, or otherwise, we need not put an unnecessary strain on practical reasoning in an effort to find an explanation. It will be sufficient to say, until some practical need requires further analysis, that for practical purposes a legal relation exists (without unique spatial definition) *where the sovereign through executive agencies acts upon the concept*. It will be seen that this theory does not require any assumption whatever that a legal relation has even a spatial reference other than executive action following, not to give legal relations a position in space, but to give them practical effect. A legal relation, therefore, (1) can not be demonstrated to exist in space or to have

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<sup>9</sup> This statement, of course, will be highly unacceptable to those realists who can see no distinction between the state and the government, or between law and sociology. Juridical sovereignty does not mean absolute physical omnipotence nor does it imply anthropomorphism; but it does require a workable equilibration of the organized forces of the state. When this balance is lost, the state ceases to exist and juridical omnipotence ceases. Cf. *E. D. Ellis* "The Pluralistic State," *Am. Pol. Sc. Rev.* 14:393. See also *Kelsen* "Problem der Souveränität."

<sup>10</sup> Cf. *Cook* "The Logical and Legal Bases of the Conflict of Laws" (1924) *Yale L. Jour.* 33: 457 (476); *Corbin* "Rights and Duties" (1924) *Yale L. Jour.* 33:501 (503).

a spatial reference for its existence apart from executive action flowing from its recognition; (2) nor does the practical mission of legal science require any such assumption.

**14. Advantages of the conceptual theory.**—Put to practical use, no instance we believe, can be found where this theory will not accord with the course of decision in cases where the question under discussion can arise.<sup>11</sup> On the contrary, the conceptual theory of legal relations has the important practical functions, (1) of emancipating juridical law from the restrictions of territorial theories of the nature of legal relations which in many cases result in obvious failures of justice; (2) of simplifying the concept so that justice is not thwarted by various erroneous legal premises that often lead to unjust technical solutions; and (3) of emphasizing the grounds of policy which in the last analysis should be determinative of whether and on what terms a legal relation can be said to exist for the purposes of executive action in a given state.

**15. The same investitive facts may generate plural legal relations.**—It being shown that the attribution to a legal relation of the quality of physical position is a fiction and an unnecessary and sometimes an inconvenient one, the collateral question is presented whether the same investitive facts may and do generate more than one legal relation. As to this problem there is no room for choice. Investitive facts generate as many legal relations as there are states which give them independent recognition. If a contract is made in state *x* or a tort committed there, every state in the world may be ready to recognize the ensuing legal relation. The fact that all the states of the world except *x*

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<sup>11</sup> In *McDonald v. Mallory* (1879), 77 N. Y. 546, 7 Abb. N. C. 84, 33 Am. Rep. 664) there was a tortious killing on the high seas. "At the place where the injury was consummated," says the court, "there was no law by which to determine whether or not it rendered the defendants liable to an action, unless the law of the state to which the vessel belonged followed her." On the facts, the New York statute was held to extend to the tort. In the argument of the court, the only objectionable idea is that the law *followed* the vessel. In other respects the reasoning and decision support the view contended for. The only question (after the question of admiralty jurisdiction is set aside) is of the power of the state and the legal policy of exercising it.



are foreign to all the elements leading up to a *iuris vinculum* is immaterial. It is sufficient that states other than state *x* are willing to give executive aid if and when called upon. The fact that no other state than *x* is called upon and can not give executive aid because the defendant and his goods are beyond the state's territory, in no way affects the *existence* of the legal relation. The case here is not essentially different from that where a contract is made or a tort committed in a given state, let us say, state *x*, and where the party obligated immediately leaves the territory with his goods. Executive aid can not be given in state *x*, yet it can not be doubted that a legal relation exists for that state. There is, therefore, no difficulty in the statement that the proper investitive facts create as many legal relations as there are sovereigns ready to afford executive remedies.

16. **The sovereign gives and applies only his own law.**—We can not accurately say that such investitive facts create only one legal relation, as the language of the courts sometimes indicates. There are two reasons: (1) A sovereign can give only his own law. To say that a sovereign enforces the law of another state is a contradiction of terms. Legal relations are created by law. Since there are different laws for the different states, there must also be different legal relations in the various states which recognize them. (2) When we say that these legal relations are different we mean only that they are independent, that is to say, they have an independent source.

The content of these relations may be similar in all states; ordinarily they are. A duty to pay 1000 lire in Italy would be recognized in America also as a duty to pay not the exchange value, but the same amount of Italian money; but the foreign state could transmute the duty into its own exchange, if it saw fit.<sup>12</sup> But while sanctionable legal relations (relations having sanctions) are similar everywhere (not necessarily, but in prevailing practice) yet the sanctioning remedies differ from state to state.

<sup>12</sup> It would necessarily take that course in an action upon the duty broken. Cf. *Guinness v. Miller* (1923) 291 Fed. 769, and the discussion of the court's reasoning by Prof. Cook "The Logical and Legal Bases of the Conflict of Laws" (1924) Yale L. Jour. 33:457 (474). See also *Petkus v. Lietuvos Ukio Bankas* (1924) 204 N. Y. Supp. 726.



These sanctioning remedies, consisting in part of instrumental rights concerning pleading and practice, are historically peculiar to each state.

17. **Immobility of legal relations.**—If a legal relation were a substance perceptible to the senses or if it occupied a position in space, it would also be mobile.<sup>13</sup> It might be here one moment and there the next moment. But, if a legal relation is purely a concept having no definite position in space, it necessarily follows that it can not change position in space. Here, again, the language of the courts is based on the theory that a legal relation is either itself a physical substance or is connected with physical substance.

(1) *The obligatio theory.* In a leading case<sup>14</sup> Mr. Justice Holmes says of a duty rising out of a tort: "It gave rise to an 'obligatio' which like other obligations follows the person."

That case was a suit in the United States based on an act in Mexico. Relief was denied here because the Mexican law provided for an alterable installment judgment which could not be given under the practice of American courts. The decision is based on the view that the Mexican law "determines not merely the existence of the obligation, but equally determines its extent." This is the Roman law theory of delictal 'obligatio' which seems not to have recognized an underlying sanctionable (primary) claim. It is the view that there is no legal relation until the tort is committed. It is not, however, in the nature of things a necessary view and it would be possible to conceive of the state of Texas guaranteeing the claim to corporal integrity of persons living in Mexico on equal terms with its own citizens. Whether it would be expedient is another question. The net result of the case referred to is that while there was an 'obligatio' which probably would have been recognized in Mexico there was no 'obligatio' that would be recognized in the United States. It was not a case of a legal relation in motion and even if the result had been to allow a recovery, it would not be necessary, or even

<sup>13</sup> Unless a legal relation is a dimensional concept like land which is neither perceptible nor movable.

<sup>14</sup> *Slater v. Mexican National R. Co.* (1904) 194 U. S. 120, 48 L. ed. 900.

possible, as we think, to conceive of the Mexican 'obligatio' moving with some human being into Texas. The chief criticism of the theory is not that a legal relation has mobility, but the consequential theory that there is only one legal relation for the entire world.

That the theory of mobility is unworkable may quickly be seen. It is the prevailing American rule in Rights of Foreign Incidence (so-called conflict of laws) that what is a tort in a foreign state will be recognized as a tort in the domestic forum. If the 'obligatio' did not already exist in the domestic forum it could be imported by the parties, as the theory has it. If, however, the parties go to a jurisdiction which does not recognize a foreign tort, either the 'obligatio' has become detached from its corpus at the boundary or else it has ceased to exist.

The usage which attributes mobility to legal relations is entirely figurative. In that alone there is no harm, but when the analogy is taken seriously it can have very detrimental consequences by perverting the sound theoretical foundations of legal reasoning, but, especially, by clouding the actual questions of legislative policy which lie at the base of the solutions in this field of cases. We believe no instance can be found where judicial reasoning appears to be based on the view of mobility of legal relations which will not be better understood in the light of legislative policy on the theory of immobility of legal relations.

The tendency to attribute the qualities of motion to legal relations results from a confusion of the judicial process which deals as such only with legal relations and the executive process which deals with persons and objects. That the defendant is in the jurisdiction of the court where he may be served with process is a physical fact, but that a legal relation is in existence for a given state or for a given court is a conceptual fact. The physical fact depends or may depend on physical motions of human beings or of goods and since legal relations have their practical expression in such movements, it has been easy to make the characteristics of executive process the foundation of juridical theory.

(2) *Other instances of the theory of mobility.* There are

chiefly three other instances where the prevailing theory attributes physical motions to legal relations.<sup>15</sup> One instance is that of the attribution of situs to a debt for the purposes of garnishment. Another instance is the attribution of situs to a debt for the purposes of taxation. The theory, however, in these two instances leads to contradictory results. In a well known case<sup>16</sup> the court said that "debts as such have no locus or situs, but accompany the creditor everywhere and authorize a demand upon the debtor everywhere." It needs only to be said that it is hard to conceive of a thing whether material or ideal which has no locus and yet which can move or be moved or carried. In a later case<sup>17</sup> the same court said that the "obligation of the debtor to pay his debt clings to and accompanies him wherever he goes." The effect of these and other similar cases is to assume either (1) that the whole legal relation for purposes of enforcement moves about with the debtor or (2) that the ligable pole (the obligation of the relation) moves about, while the other pole (creditor pole) is perhaps also moving, but perhaps in some other direction.

The first view is impossible enough to accept, but the second view is very nearly destructive of any idea whatsoever of a legal relation, in this, that the relation appears to be severable depending on the physical motions of the debtor and of the creditor.

Here again we need only to assume the existence of the legal relation in the states which provide for garnishment of debts. There is no situs for any practical need and there is no necessity of assuming any motion of legal relations. Executive aid alone (which is no part of the juridical function) depends on the contingency of the physical movements of human beings to make this aid practically effective. Any discussion of situs or mobility in these cases is beside the point, unnecessary, confusing and likely to produce a bad technical result. The bad technical result is well shown in those cases which assume that a debt has a situs either of the creditor or debtor and nowhere else. As to these

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<sup>15</sup> *Carpenter* "Jurisdiction Over Debts for the Purpose of Administration, Garnishment, and Taxation" Harv. L. Rev. 31:905.

<sup>16</sup> *Chicago R. I. & P. Ry. Co. v. Sturm* (1899) 174 U. S. 710, 43 L. ed. 1144.

<sup>17</sup> *Harris v. Balk* (1904) 198 U. S. 215, 49 L. ed. 1023.

cases it may be said that legislative policy might conceivably restrict executive aid to the domicile, but that it is erroneous to assume for that reason that the legal relation in question has any unique position in space or any capacity for movement. In a word, the sole question is *whether it is expedient to give executive aid*. That question being answered the existence or non-existence of the legal relation is disposed of without need of the fiction that legal relations have the qualities of position or movement.

(3) *Taxation cases*. In taxation cases, two kinds of situs are recognized. (1) There is a situs of lands and chattels, public securities (state and municipal), bank circulating notes, investment funds, and commercial credits.<sup>18</sup> (2) Bonds, mortgages, and debts generally, are said to have a situs at the domicile of the creditor.<sup>19</sup>

No departure can be admitted for these instances. Land and chattels have a true situs. Land has a situs without being movable. Chattels have situs and mobility. A debt, whether represented by a specialty or not, can not have a situs or have mobility. Where, however, the debt is represented by an instrument, such as a bond, an acceptance or a note, the instrument has a situs and may be taxed by any sovereign who can control the disposition of it, either directly or indirectly. The same is true of a chose in action represented by funds or other non-specialty credits. Questions of constitutional law and legal policy apart, there is no obstacle to prevent a sovereign from taxing a simple debt owed by a citizen to a foreign citizen. It is simply a question of power in such a case and there can be no doubt that it could be effectively exercised, but that does not lead to the conclusion that the debt, i. e., the legal relation, has a situs in that state. Analytically the situation is this: the creditor has a claim which is recognized in the state in question against the debtor in that state. In various ways, the state may require the payment of a tax which affects the enforcement of the claim

<sup>18</sup> *New Orleans v. Stempel* (1899) 175 U. S. 309, 44 L. ed. 174.

<sup>19</sup> *State Tax on Foreign-held Bonds* (1873) 15 Wall. (U. S.) 300, 21 L. ed. 179.

(e. g., by requiring the debtor to deduct the tax). It is not a question of situs of the legal relation at all but one of control of persons or objects in the actual power of the state. Another way of putting it is to say that since the debt is only a conceptual formula there is no way to deal with it directly. It can only be realistically dealt with by putting a constraint on some person within the physical power of the state.

(4) *Derivative ownership.* The third important instance where the prevailing juristic theory attributes motion to legal relations is in derivative ownership through agreement or by executive, and more rarely by judicial, act.

If *S* for a price sells and delivers a horse to *B*, it is commonly supposed that *S* has caused to pass from himself to *B* that complex of legal relation called ownership. That the horse has been transferred, i. e., moved in space from the physical control of the seller to the physical control of the buyer is an objective fact that can not be doubted. The question is, has the ownership (i. e., the legal relation or relations) passed from the seller to the buyer?

While the prevailing view is for an affirmative answer, yet if ownership is only a concept hypostatized by lawyers, it is quite impossible to conceive of the process of transfer. While this is true, the attribution of mobility to legal relations probably is only a scientific inaccuracy of negligible harm; but if the theory of transfer were rigidly followed, it would, it is easy to see, come into conflict with many accepted rules of law that can not be reconciled with such a theory. That it is untenable does not seem to be very difficult to show. A few instances will be put.

If *B*, the buyer, happens to be an infant, the complex of legal relations with which *B* is invested is not the same complex of relations that *S*, the adult seller had. We assume here that the difference in the legal relations as between *S* and *B* relating to the same object is logical proof of the fact that what *S* had did not *pass* to *B*. The minor could rescind the sale. The adult seller did not transfer that power to the buyer.

It might be opposed to this argument that the power of rescission is collateral only and is a quality of the infant; but the reply



is that the infant before the sale had only a capacity for the power of rescission and that the concrete capability was invested in him with the title to the chattel; the sale itself was one of the investitive facts of the power. Again, it may be opposed, that only proves the infant buyer got the title of the seller; so much at least was a transfer. To this it can be replied that what the infant had after the sale he got by the investitive facts of the sale, one of which facts was the buyer's minority. The proof is in reversing the parties. If the adult were the buyer, the infant could rescind, but the adult could not rescind.

Another instance that may be put is where the buyer in some manner is under an estoppel from asserting title as against a third person. Clearly the legal relations of seller and buyer are not the same; the buyer gets less than the seller had who was under no disability to assert title as against the third person. And, again, the seller may lie under an estoppel, but if having possession he loses it <sup>20</sup> to an innocent buyer for value, then the buyer has gotten more than the seller had. It may be noted, that where a thief invests a good title in another, as in the case of bank notes, it has never been supposed that there was a transfer of ownership, at least not from the thief, nor in the case of sheriff's sale has it ever been supposed that there was a transfer of the owner's title; but the fact that the seller does not himself have title does not alter the situation. In none of these cases, of whatever sort, is there or can there be a transfer of legal relations.

The question may now be raised, if in sales and other so-called conveyances there is no transfer, what happens? <sup>21</sup> Since it is

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<sup>20</sup> Possession is a concept of an objective fact. Ownership is a concept based on objective facts but not of objective facts. There is much confusion in the use of philosophical terms and in order to make our meaning clear to ourselves and to others, we shall call concepts of objective facts, *perceptive* concepts. Concepts which have an objective basis, but which are not of objective facts, we shall call *constructive* concepts. A legal relation, therefore, while it overlies objective elements, is a concept constructed by the jurist. It has the same nature and function as the concept of personateness; it is a necessary tool for the purposes of accurate legal thinking. While possession is a perceptive concept, yet it also does not submit of transfer. It may be acquired or it may be lost, but it can not be passed to another.

<sup>21</sup> Cf. *Aylett v. Minnis* (1791) Wythe 219 (225) and note (c) of the 1795 edition.

certain that something does happen, there is, we believe, only one way to account for it—certain facts operate to destroy the legal relations of one person and at the next moment to create legal relations of a similar kind in another person. We conclude, therefore, that in these cases there are no translative facts, but only substitutive facts.<sup>22</sup>

**18. Partibility of legal relations.**<sup>23</sup>—A legal relation, whether considered objectively or subjectively, is constituted of various elements—a dominus, a servus, a legal condition of having a control, a legal condition of being under a constraint, and a latent act which defines the scope of the control and the constraint. These are the irreducible internal elements of a legal relation. There are also various external elements not necessary now to consider. If this is a correct statement of the matter, then it must be clear at the outset that a legal relation can not be divided either objectively or subjectively. A person can not like an amoeba be divided. Neither can an act be divided.<sup>24</sup>

(1) *Partial assignments.* Let us suppose that *C*, a creditor, in the sum of \$1,000 owing by *D*, the debtor, makes an assignment<sup>25</sup> of half the sum to *A*, an assignee. At law, *A* would get

<sup>22</sup> This term is used by *Terry* for acquisition of rights under statutes of limitation, sales in market-overt, and judicial sales: "Some Leading Principles of Anglo-American Law" p. 140. As we have seen, however, the term is the only proper one even for the instance where there is 'privity' between the parties.

<sup>23</sup> This topic has been much discussed on the Continent. Among the works that should be consulted for further detail of the questions involved, but especially dealing with Roman law are: *Bekker* "System des heutigen Pandektenrechts"; *Brinz* "Lehrbuch der Pandekten"; *Rümelin* "Die Theilung der Rechte" (list of citations of other works, page vii); *Savigny* "Das Obligationenrecht als Theil des heutigen römischen Rechts"; *Scheurl* "Teilbarkeit als Eigenschaft von Rechten"; *Steinlechner* "Das Wesen der iuris communio und iuris quasi communio"; *Ubbelohde* "Die Lehre von den untheilbaren Obligationen"; *Windscheid* "Lehrbuch des Pandektenrechts."

<sup>24</sup> Cf. contra *Rümelin* "Die Theilung der Rechte" pp. 16 sq., 181. One act may be made up of a complex of other acts, but each act considered as a unit is indivisible. The view taken here of the nature of an act is that it is a jural result (1) flowing from a human reflex (= strict sense), or (2) attributable to an omission of a human reflex.

<sup>25</sup> The term 'assignment' is not entirely satisfactory but we believe it is best to retain it, because of fixed usage. Other sciences exhibit many

nothing by the act. In equity, *A* has a remedy and has a claim to receive from *D* the sum of \$500.

Superficially, it appears more natural to believe that what *C* has accomplished is a division of his right. That arises from the fact that one naturally thinks of the amount in money of the claim. That sum, of course, is divisible, but the creditor does not divide the money since he has only a claim to have it. Can he divide the claim? Superficially, again, that seems possible, but a little reflection shows that a claim is a capability supported by the law to require an act. That capability can not be divided, nor can the act be divided. Material objects only can be divided. Concepts are not divisible.

Only one explanation seems to be available to explain the result of the creditor's act. A trust theory does not seem to be workable and it introduces unnecessary complications. The creditor exercised a power to substitute two claims for one. The old claim in consequence was extinguished and two new claims of an equivalent amount took its place. This, it will quickly be seen, is simply an application of the principle of novation. Apart from the proof already advanced, the proposition of novation may be demonstrated from a practical point of view. If the creditor owed an equitable duty to a fourth person, the assignment, it would seem, would be burdened by the equity even though the assignee took in good faith and for value. This would appear to follow as the natural result of dividing the right, but if, on the contrary, the right is not in theory divided, but is replaced by two or more new rights, it is not difficult to apply the ordinary equitable rules. The assignee takes in good faith and for value, and the equity of the fourth person does not attach to the assignee's claim. The answer conceivably might be the other way, but if it were it would follow not from the nature of the transaction but because of the legal policy of producing that result.

(2) *Divisions of land.* If the owner of Blackacre makes a plat

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terms which have come into settled use under theories later shown to be erroneous. It is a question of economy of effort. It is generally easier to continue the employment of faulty terminology than to substitute new terms made to fit a more workable hypothesis.

of the land dividing it into ten lots, has he divided his rights into ten groups of rights? Physically, we may assume, the land has undergone no change. Has the owner ceased to be the owner of Blackacre? We see no reason to doubt the answer that would be consistent with the foregoing discussion. Blackacre no longer exists and it has no owner. If an adverse possessor was on the land at the time of platting, then ejectment must be commenced by the owner of the lots, there being now no owner of Blackacre. If a trespass was committed on Blackacre, an action could be maintained for that trespass, either before or after the platting, but in an action for mesne profits the plaintiff would be put to recover for two distinct trespasses, one before and the other after the platting, and concerning different objects, the undivided land and the platted lots. On the other hand, if an adverse holder of Blackacre continues his possession adversely for the prescriptive period, it would seem that he should get title (or its equivalent) to Blackacre even though the first owner had lost title in the meantime to Blackacre by platting the land.

After such a division of land, the owner clearly has not divided his rights into parts, but has multiplied them. Where, before, he had one complex of rights against persons generally to abstain from trespass, he now has ten such distinct complexes of rights against the same persons. It could not be otherwise, since if the view were taken that by platting, the owner had divided one right into parts it would be necessary to say either (1) that a part of a right is a whole right or becomes one after separation, or (2) that a trespass to a part is a partial trespass. The true view, we think, is that the owner has exercised his power of creating in himself multiple complexes of rights in substitution for one complex of rights. The whole process is conceptual; it has only an indirect relation to the object itself. This is shown by the fact that a mere physical platting of the land into lots without the statutory requirements has no effect whatever on the existing legal relations.

(3) *Joint and common rights.* It is relevant in this connection to consider the nature of joint and common rights. It is commonly said that in the case of joint rights there are two (or



more) persons, one right, and one object; and that in the case of common rights there are two (or more) persons and rights and one object.<sup>26</sup> If it were true in the case of joint rights (and what is said of rights applies to the correlative ligations) that two persons own one right, then one right is divided between two persons, and each owns half of a right. That way of putting it carries its own refutation. There can be no ownership of half a right. In both cases (joint and common rights) there are an equal number of rights. These rights, if concerning land, are numerous. Thus each joint and common tenant has certain rights against third persons. And each joint and common tenant has certain quasi-contractual rights against each of the other co-tenants. If these rights against third persons are arranged in bundles of unpolarized rights (so-called rights in rem), and the rights against co-tenants because of polarization are regarded separately, it will be found that the unpolarized rights increase in arithmetical progression according to the number of co-tenants. Thus, if there are two co-tenants there are two bundles of unpolarized claims; if there are five co-tenants there are five bundles of unpolarized claims. The quasi-contractual claims, on the other hand, increase by multiples.<sup>27</sup> If there are two co-tenants there are two polarized quasi-contractual rights; if there are five co-tenants, there are twenty polarized quasi-contractual rights.

The differences between joint and common rights do not lie essentially in the number of rights, but in the manner in which these rights respectively are created or extinguished. One of the chief differences is the common law 'jus accrescendi' which attaches to joint rights but not to common rights (and also to the correlative ligations).<sup>28</sup>

Where there are joint duties it has been said that "there is only one debt or other cause of action, as well as only one thing owed."<sup>29</sup> We meet here the same difficulty encountered before.

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<sup>26</sup> Cf. *Terry* "The Common Law" (2d ed., Tokyo 1906) p. 158; *Salmond* "Jurisprudence" (3rd ed.) § 166.

<sup>27</sup> The formula is the number of co-tenants multiplied by one less than the number of co-tenants.

<sup>28</sup> At Common Law a surviving joint debtor was ligable for the whole debt and the estates of the deceased debtors were exonerated.

<sup>29</sup> *Salmond* "Jurisprudence" (3rd ed.) § 166. The only way this view



If there is only one debt, which means no doubt one duty to pay, then two persons owe that same duty. It would seem that the only way two persons can owe one duty is by some method of sharing it. Each owes half a duty. That, however, clearly is not the way the law deals with it. If two joint debtors are sued, the creditor may recover one whole amount from either one or from both. The fact that the whole amount may be recovered from one of two (or more) joint debtors in a joint action demonstrates, we believe, that each one owed the full amount of the claim. In other words, there were as many duties as there were joint debtors.

It may be objected that if there are as many duties to pay the full amount as there are joint debtors, that then there are as many claims to be paid in full as there are joint debtors. That must be admitted, but it is not yet a valid objection. It may be further objected, then, if there is a joint debt of \$100 owed by five joint debtors, the creditor has a claim to \$500 by the admission. That, however, can not be admitted, but it may be admitted that the creditor has five claims each to the sum of \$100. When there is a debt jointly owed there are as many claims and as many correlative duties as there are joint debtors. Each of these claims is for the full amount of the debt, but they are conditional claims, the condition being one full payment of the amount of any one claim or any fact which would discharge any one of the various duties. Here, again, as in the case of joint and common rights, there is no difference between joint obligations, several obligations, and joint and several obligations, except in the manner of their creation and in their discharge. The same method of analysis is applicable to the case of joint obligation claims. The claims are not divided claims but are integral claims of a similar kind and subject to the condition of one full integral performance of any one of these claims. Or, alternatively, if there is but one debt, joint creditors and joint debtors constitute an independent

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can be rationalized is by supposing that joint debtors are an entity, a distinct legal person, different from the debtors themselves. On this basis, this view is perhaps to be preferred for its simplicity to the alternative explanation of coincident dependent relations. Cf. chap. IV (*supra*), n. 4.

legal entity—an explanation powerfully supported by the common-law rule of survivorship in joint rights and obligations.

(4) *Legal and equitable ownership.* Legal and equitable ownership present another illustration of the question of plural legal relations having a similar content. It is not a case of one right being divided into two parts, one legal and the other equitable, but of two distinct rights, one recognized in a court of law and the other recognized solely in a court of equity. If there is an equitable assignment of a debt, the assignor continues to be the legal owner of the debt, but the assignee, under the prevailing theory, becomes the 'equitable owner' of the debt. That there are now two rights is entirely clear, but are there now two debts? When it is said, as has been said, that there are *two* owners but only *one* debt,<sup>30</sup> we again meet an old difficulty. Two owners of what? Two owners of one debt? If that, then each owner owns half the debt, with this peculiarity that one-half is legal and the other half is equitable. That will not do, and it does not seem that anything else will do except to say that *if* there are *two* owners there must be *two* debts, one being a legal debt and the other an equitable debt. But it may not perhaps be necessary to say that there are two owners. It may be possible to say that there is only one owner—the legal owner, the original creditor—leaving to the assignee merely equitable rights other than equitable ownership. Thus the assignee has an equitable claim against the assignor to be made legal owner of the debt,<sup>31</sup> and the assignee also has a claim against the debtor to the payment of the money upon the theory that the legal title (in a court of equity) has already become vested, or ought to be vested, in the assignee. On this view there is never more than one ownership, the legal ownership, and there is only one debt.

The idea of two owners of one right (or complex of rights,

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<sup>30</sup> *Salmond* (op. cit., p. 236) says: "But there are not for that reason *two* debts. There is only one as before though it now has two owners."

<sup>31</sup> *Cook* "Alienability of Choses in Action" Harv. L. Rev. 29:816, 30:449; *Williston* "Is the Right of an Assignee of a Chose in Action Legal or Equitable?" Harv. L. Rev. 30:99; *Williston* "The Word 'Equitable' and its Application to the Assignment of Choses in Action" Harv. L. Rev. 31:822.

as in ownership) is intellectually impossible to assimilate, even though we try to distinguish their character as legal and equitable. The effort to make that idea technically workable may account for some of the theoretical difficulties that have engaged the attention of jurists.<sup>32</sup> Nor does it seem feasible to say that there are two owners of two different objects of ownership co-extensive in time and in quality. There may be ownership of a right of life estate and ownership of a right of remainder, but there can not be two independent owners of one life estate or of one remainder.

The problem now under consideration may be simplified by putting aside choses in action which present a special difficulty from the fact that they were not assignable at common law, but were regarded as assignable only in equity. Let us take for our illustration of equitable assignment an enforceable promise to convey land. Here, again, the prevailing theory is that there are two owners, one the legal owner and the other the 'equitable owner' of (rights in) the same land. But is it necessary to accept such a view? Do the courts in fact operate with such a theory? We believe they do not. In such a case there is only one ownership, the legal ownership, that legal condition of things where one person is entitled to require a certain external attitude with respect to an object as against other persons in general. We are not dealing here with the idea already discussed, of joint owners who were shown to be plural owners, not of one (bundle of) right but of equivalent plural bundles of rights accommodated by the connecting idea of quasi-contractual rights, also equivalent, between the plural owners.

Trust and so-called beneficial ownership are not an instance of joint ownership. The rights of the trustee and of the beneficiary are dissimilar. But is there any beneficial 'ownership' where there is trust ownership? We think not. In the case last put, the vendor holds the legal title in trust for the vendee. The vendee is the owner of certain equitable rights, the principal one being the claim to have the legal title conveyed to him, but he

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<sup>32</sup> Cf. *Scott* "The Nature of the Rights of the Cestui Que Trust," Col. L. Rev. 17:269; *Stone* "The Nature of the Rights of the Cestui Que Trust" Col. L. Rev. 17:467.

is not equitable 'owner' of the land. There is a sound judicial instinct back of the requirement that the legal title in some manner must be conveyed, because it represents the only ownership there is or can be of the res. Courts of equity go through more ceremony that is analytically necessary, out of deference to the law courts in these matters; but they have the power, at least they might have the power, to declare the legal title in the owner of the equitable right and with a retroactive effect without the formality of decreeing a specific conveyance. This thought is already brought to effect in those jurisdictions that hold that a conveyance by the trustee to the beneficiary is unnecessary where an active trust has been carried out and nothing more remains to be done.

In sum, there can not be plural independent ownership of the same object. There may be two dependent owners of the same object as in the case of joint and common ownership, just as there may be co-possessors, but the idea of independent owners is as incongruous as the idea of independent possessors. 'Plures eandem rem in solidum possidere non potest' is a maxim not only of the civil law, but is a fact which has a force of its own. Given the accepted definition of possession, the fact follows.

There is a considerable body of proof for the view taken. Thus, where a trustee in breach of his duty to the beneficiary conveys the trust res to a third person, the beneficiary either (i) may ratify the wrong and look to the trustee for the proceeds, or (ii) may look to the third person as a new trustee. All remedies concerning the trust res must be worked out through the trustee; in general, the beneficiary sustains no legal relations to third persons involving the trust res.<sup>33</sup>

(5) *Successive acts.* In the further consideration of the question of partibility we are confronted with legal relations that involve a succession of acts on one side or on both sides of

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<sup>33</sup> The exceptional case where the beneficiary has a remedy against third persons can be explained on other grounds than that of equitable ownership. The beneficiary may, and some of the cases seem to require us to say that he does, have unpolarized equitable rights, but the fallacy lies in assuming that these equitable rights against third persons are necessarily rights of ownership.



legal relations, such as installment contracts for the payment of money or delivery of goods, building contracts, general agency, partnership, marriage, active trusts, etc. A first question is whether a legal relation can involve more than one act. That question must be resolved since if a legal relation can involve more than one act then perhaps it may be possible to say that a legal relation can be divided by performance or by breach.

Let us suppose a contract for delivery of ten successive lots of merchandise where payment for each lot delivered is a condition for later deliveries. There is here only one 'juristic act,' i. e., one act of contracting. Is there one legal relation; or are there nine legal relations (there are nine conditions precedent); or are there ten legal relations? We shall attempt to show that neither of these numbers can be correct, and that there are either two or twenty principal legal relations besides a large number of other subsidiary legal relations that need not be noticed in this discussion.

The problem can best be understood by simplifying the elements. If *A* and *B* are in legal relation or 'nexus' to each other in such wise that each owes the other an act of performance under one juristic act of contracting, then there are two principal legal relations. These acts of performance may be dependent or independent. If independent, then enforceability of performance of one does not depend on prior offer of performance of the other. If dependent, then enforceability of performance of one depends on precedent offer of performance of the other.<sup>34</sup>

We may now suppose a similar act of contracting with two acts of performance on each side. The performances on one side may be dependent on the performances on the other side,

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<sup>34</sup> Two conditions can not mutually be dependent upon performance. See for a discussion of this question "Classification of Jural Interrelations" (chap. xii). An attempt has been made to escape the difficulty of this logical proposition by saying that where there is an offer of performance on one side there must be a 'willingness' to perform on the other. We do not believe the importation of this subjective element aids the matter. If one of the parties has uttered words showing an abandonment of his duty then the case is one either of present or anticipatory breach, and in accordance with usual rules governing tender, there is no need of the idle ceremony of an offer of performance on the other side.



or they may be independent. If dependent, they may be dependent in either one of two ways: (1) An offer of performance on one side may be a condition precedent to enforceability of a claim to performance on the other, or (2) after performance on one side of one act, offer of performance on the other side may be a condition precedent to further duty of performance on the opposite side.<sup>35</sup>

The law as we understand it is in conflict upon the points involved,<sup>36</sup> and we therefore deal only with assumed legal solutions. Where there are plural successive acts to be performed, a failure to perform one act may be: (i) A severable breach (a) by election, or (b) by operation of law; or (ii) a breach of the entire contract (legal relation) (a) by election, or (b) by operation of law.<sup>37</sup>

The answer to the question raised then follows: If failure to perform one of several acts is a severable breach not affecting the other performances, then there are as many legal relations as there are acts to be performed on both sides. If failure to perform one of several acts, either by election or operation of law is a breach affecting all the other required performances,

<sup>35</sup> Various permutations may be worked out even in the relatively simple case of two performances on each side.

It will be observed that in accordance with what is said in the previous note (No. 34) that we reject here the idea of mutually dependent (upon performance) concurrent conditions. Conditions may be concurrent in point of time, but they can not be concurrent in the sense that performance on each side is mutually dependent on performance on the other side. An act is a jural result. Acts are indivisible in a legal sense, even though they have various objective elements or parts. Furthermore, acts in a juristic sense have no qualities of duration. They are like points as distinguished from lines. Two acts may occur in the same moment of time, but since dependence of performance necessarily means two points of reference, it follows that two performances can not be required at the same moment, and mutually depend. It is believed, moreover, that even if an effort were made to attribute partibility to acts, that the same difficulty would be met in a more complex form in dealing with the parts, on the same theory of dependence. The fiction of a state of mind, a 'willingness' to perform is an irrelevant and inadmissible substitute. Cf. *Costigan* "The Performance of Contracts" (1911) p. 11.

<sup>36</sup> For leading cases dealing with delivery by installments see *Hoare v. Rennie* (1861) 5 Hurl. & N. 19, 29 L. J. Exch. 73; *Simpson v. Crippin* (1872) L. R. 8 Q. B. 14; *Norrington v. Wright* (1885) 115 U. S. 188, 29 L. ed. 366. The Uniform Sales Act (§ 45) seems to leave the question open.

<sup>37</sup> And in both cases, with or without the power to waive the breach.

then we may say (a) that there are as many legal relations as are affected in different ways. Thus, if failure to perform one act gives the other party the power to sue for that breach alone and the power to rescind as to all the other performances on both sides, then there are on this view two legal relations—one involving one act and the other involving several acts. (b) But, since breach of any duty in the series, on the hypothesis, affects all subsequent performances, then each act is the content of a complete legal relation.

The latter view, we believe, is the correct one, and if the position taken is sound, a legal relation can involve only one act. The character of a legal relation, of course, must be determined by the way the law deals with it. But single instances do not always disclose the entire truth. Thus, where there is an entire contract requiring plural performances, the general rule is that no contract action can be maintained upon a partial performance. It is another familiar rule that if suit is brought on part of an entire demand, judgment bars an action for the remainder. But these rules do not disclose the complete fact. There might be a quasi-contractual duty to pay for a partial performance, and in various ways a breach of a single performance in a series may give rise to legal consequences. The governing test seems to be this: *if an act for any purpose creates or destroys a legal relation, then that act for that purpose is itself the content of a legal relation.* The fact that for procedural purposes the courts often deal with a plurality of legal relations as if they were a unit does not alter the matter, if in other situations it can be demonstrated that the relations dealt with are in fact separate relations.

Finally, it may be observed that the quality of a legal relation can not ordinarily be determined by facts which occur after that legal relation has come into being. It is at that moment a part or a whole, polarized or unpolarized, positive or negative, etc.; it can not change its internal nature by any subsequent fact whatsoever. Legal relations have an integral character more enduring even than atoms. Atoms may disintegrate into other atoms, but a legal relation remains constant as to its internal elements. Its life history is summed up in two stages—it comes

into being; it goes out of being. This, however, does not exclude the possibility of the alteration of legal relations at least as far as concerns the jural elements of time and space, without affecting the substance of the act which is the content of the legal relation.

(6) *Estates in land.* With reference to estates in land less than a fee, Mr. Terry, arguing against the Roman theory, takes the position that the fee is divided into as many parts as there are estates created. As he puts it: "The sum of the rights in the land is still only equal to a fee simple; the dominion is not burdened, but cut up."<sup>38</sup>

Since Mr. Terry's principal discussion at this point is of incorporeal things, it is no answer to our question to say that 'emphyteusis' (which resembled earlier forms of freehold tenancy) was regarded as an incorporeal thing and that a fee tail was regarded as a corporeal thing.<sup>39</sup> The question of corporeality of things (rights) has nothing to do with the question of divisibility of rights. And, again, if we are to understand that if a thing is incorporeal, it must be a burden on another right, that is to say, a 'jus in re aliena,' that assumption is clearly incorrect. A chose in action is an 'incorporeal thing,' and yet it is not an incumbrance. A life estate may be regarded as an incumbrance, or not so regarded, without once touching the problem of divisibility of rights.

The position that we take here is that ownership is a right (bundle of rights) which can not be cut up. When the owner grants an estate for years, he does not cut up his ownership into two parts, one part being a 'term' and another part being a 'reversion.'<sup>40</sup> That follows for the reason that if ownership, as a unique kind of right, were divided, each part would be a

<sup>38</sup> Terry "Leading Principles of Anglo-American Law" § 45.

<sup>39</sup> "Thing" here means right. 'Corporeal things' must not be confused with 'material things.' The first is a right and the second is an object. Thus land is a spatial object, but ownership of land is a 'corporeal thing.' See Salmond "Jurisprudence" (3rd ed.) § 402 note. It is universally admitted that the terms corporeal and incorporeal 'things' are unscientific and confusing. The terms need to be known for an understanding of Roman law, but they should be abolished in modern jurisprudence.

<sup>40</sup> Contra Terry op. cit., § 45.

segment of ownership; and it is clear that a lessee is not an owner of the land. He owns only the right of lease. Nor does the lessee own a part of the land. His right is a whole right and not a partial right. After a grant of lease, the lessor still remains the owner of the land.<sup>41</sup> He would remain the owner of the land if he had granted easements of every sort, leases extending over a period of hundreds of years, and mortgages far exceeding the economic value of the land.

Ownership of an object is a right (or bundle of rights) safeguarding the owner's liberty of indeterminate use of that object.<sup>42</sup> If incumbrances have been granted, such incumbrances cut down the incidence of indeterminate use; they cut down its range; but there always will be a residue, no matter how numerous these specific limitations; and so long as any residue remains there will be a potentiality of indeterminate use.<sup>43</sup> It seems quite clear that there is a distinction based on the concept of ownership between a life estate and a remainder; as much so as in the case of lease and reversion.<sup>44</sup> The life tenant differs from the tenant for years only in the method of limitation of the estate. It is specifically limited in both cases. If we regard the matter quantitatively it will be seen that 'usufructus,' 'usus' and life estate, while involving the idea of relative indeterminateness of user as compared, for example, with an easement of way or a profit, possess less potentiality of user than a remainder.<sup>45</sup> In other words, the indeterminateness of user is greater in extent in the case of a remainder than in any other estate that precedes it except the fee simple. That being true, it does not seem correct to say that the owner of a life estate is technically an owner.

We have attempted to show in the discussion of joint rights that one right of ownership can have only one owner, but that unless co-owners are to be treated as an independent legal entity, a new persona, then, theoretically, two *dependent* rights of owner-

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<sup>41</sup> Cf. *Salmond* op. cit., § 87.

<sup>42</sup> Cf. *Austin* "Jurisprudence" Lect. XIV.

<sup>43</sup> Cf. *Pollock* "Jurisprudence" p. 175.

<sup>44</sup> Contra *Terry* op. cit., § 45.

<sup>45</sup> Cf. *Terry* op. cit., § 385.

ship may co-exist in two owners. The problem now under consideration is not one of joint ownership, but of coincident rights concerning the same land or chattels. There is one residuary owner (usually called simply 'owner') and only one such residuary owner, but there may be plural dependent residuary owners. There are at the same time owners of various other rights concerning the same land or chattels. These other rights (e. g., life estate, easements, profits) are newly created rights; they do not arise out of transfer; and they are not legal parts of the original right of 'ownership.' The right of ownership is an integral right and it remains such even after new estates are created which occupy a part and even the greater part of its present field for economic purposes.<sup>46</sup>

19. **Conclusion.**—If, now, in conclusion, a generalization is of any service to sum up the foregoing points of discussion, we may say that a legal relation is a pure legal concept; that it may have the qualities of form<sup>47</sup> (creatability, alterability, and destructibility); but that, since a legal relation is not matter, it can not have the qualities of matter (position, mobility, and partibility).

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<sup>46</sup> Partibility in Roman law was not regarded as possible where the resulting parts differed qualitatively, as would be the case in a term and reversion or life estate and remainder. Cf. *von Scheurl* "Teilbarkeit als Eigenschaft von Rechten" p. 3; *Rümelin* "Die Theilung der Rechte" pp. 10 sq.

<sup>47</sup> Without entering into metaphysical distinctions, it may be pointed out that the term 'form' is not used here in either the Platonic or the Aristotelian sense. The meaning intended is most closely given by *Kant*: "That which in the phenomenon corresponds to sensation, I term its *matter*; but that which effects that the content of the phenomenon can be arranged under certain relations, I call its *form*": "Critique of Pure Reason" (Meiklejohn's tr.) p. 21.





## CHAPTER XVI

### CONCEPTUAL NATURE OF JURAL ACTS

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| 1. 'Act' is a fundamental concept.         | 9. Positive and negative acts.  |
| 2. Complexity of the prevailing analysis.  | 10. Classification of negative acts.  |
| 3. Austin's analysis.                      | 11. Internal and external acts.   |
| 4. Types of definition.                    | 12. Acts in the legal sense are the results of human reflexes or the absence of them. |
| 5. Conceptual nature of acts.              | 13. Problems of time and space.   |
| 6. Acts are the legal concepts of results. | 14. Jural consequences of acts.   |
| 7. Two kinds of liability.                 | 15. Unlawful acts.  |
| 8. Juristic and legal concepts of 'acts.'  | 16. Lawful acts.  |
|  | 17. Summary.  |

1. **'Act' is a fundamental concept.**—The concept, 'act,' is a fundamental one in legal science. Every legal relation of whatever sort, whether of private law or of public law, necessarily involves for its existence an act. The act involved, moreover, gives to a legal relation its jural character. An act therefore is the 'content' of a legal relation. The persons (*personæ*) of a legal relation are static elements; but the act involved in a legal relation is a dynamic element. When the involved act is performed (evolved) the persons of the legal relation remain the same persons (under changed jural conditions brought about by the evolution of the act), but the act itself, after evolution, has become an historical fact.

2. **Complexity of the prevailing analysis.**—The prevailing analysis of 'act' is singularly complex. That of Holland is typical.<sup>1</sup> According to Holland, the essential elements of an act are: (1) An exertion of the will; (2) an accompanying state of consciousness; (3) a manifestation of the will.

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<sup>1</sup> *Holland "Jurisprudence"* (13th ed. 1924) p. 108: "Analysis of a Right"; *Mill "A System of Logic"* I, 59.

(1) *Will*. Borrowing from Zitelman, Holland paraphrases the first element as "the psychical cause by which the motor nerves are immediately stimulated."<sup>2</sup>

It is apparent that we have here the effort of the jurist to assimilate, for legal purposes, the findings of the psychologists; but the learned author then proceeds to say that a 'juristic' person is incapable of willing, "unless by a representative, or by a majority of its members."<sup>3</sup> On this, it may be remarked that the law is a practical science and that it need not concern itself with motor nerves. The law, of course, must accept the findings of psychologists, but only for evidentiary ends; for example, to determine responsibility for a criminal act; but it is beyond the province of the law to enter into the details of mental science or to build up theories based on such details.

Again, it may be remarked, that we can see no need of any qualification for 'juristic' persons. A 'juristic' person can not act in any sense either mentally or physically. Juristic persons can only be made accountable by imputation for the acts of those who can act at all.<sup>4</sup> Only human beings can act for legal purposes.<sup>5</sup> It is a fiction to say that any act can be imputed;<sup>6</sup> but it is not a fiction to hold responsible one person for the act of another.

(2) *Consciousness*. The second element in the prevailing analysis of acts is 'consciousness.' As Holland puts it, "The moral phenomena of an exertion of will are necessarily accom-

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<sup>2</sup> Zitelmann "Irrthum und Rechtsgeschäft" (1879) p. 36.

<sup>3</sup> Holland op. cit., p. 109.

<sup>4</sup> "Von Handlungen kann bei einer juristischen Person da sie kein Mensch ist, an und für sich nicht die Rede sein": Windscheid "Lehrbuch des Pandektenrechts" (9th ed.) (Kipp ed. 1906) I, § 59.

<sup>5</sup> In the view which can not be elaborated here that there are only 'juristic' persons in the law, it follows that responsibility for acts of human beings must always be imputed. Responsibility for the act of Titius, a human being, may be imputed to the 'persona' called Titius. When the human being and the persona coincide as they do for most practical purposes the distinction may be disregarded in practise, but it exists nevertheless, and rarely it becomes of great technical importance as where the legal 'persona' antedates or survives the physical person.

<sup>6</sup> Terry "Leading Principles of Anglo-American Law" (1884) § 88, p. 70: "It is an absurd fiction."

panied by intellectual phenomena." <sup>7</sup> It seems a broad statement to assert the necessary coincidence of will and consciousness, but, since we believe that legal science can not be concerned with that question, it is unnecessary to attempt to survey the opinions of psychologists. It is true, nevertheless, in the field of legal wrongs, that important categories of liability have been constructed on the basis not only of a coincidence of will and consciousness but even of particular kinds of consciousness. For the purposes of civil liability, one of the most important of these categories is that of intentional and unintentional acts. Intentional acts may be actually malicious; they may be of a kind where malice is presumed; and, lastly, they may be simply intentional without malice. Of the latter sort, an intentional act may be 'directly' intentional, as where the consequence of acting determines the will to that end; or an intentional act may be 'obliquely' intentional as where the consequence is in contemplation but does not determine the will to that end.<sup>8</sup>

*Non-intentional acts.* Non-intentional acts are commonly divided into acts of 'slight,' 'ordinary,' and 'gross' negligence; into 'culpa in concreto' and 'culpa in abstracto'; into 'culpa levis' and 'culpa lata'; into advertant and inadvertant negligence; <sup>9</sup> and in various European codes in other ways.<sup>10</sup>

*Classification of states of mind in criminal law.* In criminal law, a similar attempt is seen to classify states of mind, especially in the legislation dealing with homicides. In American states, various degrees of murder are commonly recognized, and manslaughter also is often classified into two or more degrees.

These attempts to make arbitrary divisions of the functions of the mind, we believe, are bottomed on an unworkable plan. We do not doubt the reality of differences in the mind so far

<sup>7</sup> *Holland op. cit.*, p. 109.

<sup>8</sup> *Bentham* "Principles of Morals and Legislation" (1789) chap. viii. The difficulty for the law in making application of Bentham's "logic of the will" (*Principles*, Preface p. xiii) is well illustrated by the case put (chap. viii) of the shooting of William II by Sir Walter Tyrrel.

<sup>9</sup> *Austin* ("Lectures on Jurisprudence" [4th ed. 1873] Lect. xx, p. 438) says that Negligence is the inadvertent breach by omission of a positive duty; Heedlessness is the inadvertant breach of a positive duty; Rashness is the breach of a positive duty by insufficient advertence.

<sup>10</sup> Cf. *Holland op cit.*, pp. 113 seq.

as mental processes are followed by external consequences, but precisely what these differences are and how they are to be grouped and evaluated are problems as to which there is no settled view among psychologists. What the psychologist can not do in his own field, the jurist can not do for him in making application of psychical concepts. We speak of intentional and unintentional acts in the law with the false assurance that we know just what these terms mean; while the fact is that they represent ideas of very great complexity.<sup>11</sup>

It is almost universally accepted among lawyers that the distinction between intentional and unintentional acts is a necessary one in legal analysis. Thus, Holland says that "the state of mind of the doer of an act is often the subject of legal inquiry with a view to ascertaining whether it exhibits the phenomena of intention."<sup>12</sup> He gives as instances, intention to cancel a will, malice in libel, and animus furandi.

The opinions of judges and the commentaries are a unit in the view that the concept, 'intention,' is a simple one, readily understood, and free from ambiguity, and that the law can not dispense with it. To say that the idea is a highly nebulous one is equivalent to saying that the law neither does nor can deal accurately with it even in the field of criminal law. There is,

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<sup>11</sup> *Austin* (op. cit., Lect. xxi, p. 449) in describing intention says: "The party wishes or wills certain of the bodily movements which immediately follow our desires of them; he expects or believes, at the moment of the volition, that the bodily movements which he wills, will certainly and immediately follow it; and he also expects or believes, at the moment of the volition, that some given event or events will certainly or probably follow those bodily movements." It is sufficient to point out that by this analysis a surgeon who operates skilfully and with some hope to cure his patient, but with the belief that the operation will result fatally, has intended the death of his patient.

The definition of Mr. Justice Holmes avoids the difficulty of Austin's analysis but it introduces other problems. He says ("The Common Law" [1881] p. 53) " \* \* \* intent \* \* \* will be found to resolve itself into two things: foresight that certain consequences will follow from an act; and the wish for those consequences working as a motive which induces the act." Taking again the surgeon illustration, suppose that the surgeon believes that it will be better that the patient die under an operation which has some margin of possible success than live without an operation. He operates skilfully believing that the chances of death probably outweigh the chances of recovery. If the operation results fatally, has not the surgeon intended the death?

<sup>12</sup> *Holland* op. cit., p. 113.



no doubt, an idea of 'intention' in the sense of 'willing' or 'desire' or of 'purpose' which serves in current speech where most of the terms employed lack clearness of definition; and there is no doubt, either, that the idea in the great bulk of instances in the law does a rough service in the administration of practical justice; but the fact remains that if it is an idea the exact nature of which can not be stated, it can not function in a practical art except under the illusion of certainty. In the law, the illusion is not only that of certainty in the meaning of 'intention' but the greater illusion that the term functions at all. This has been shown in a learned and convincing manner by Mr. Justice Holmes. "All law," says Mr. Justice Holmes, "is directed to conditions of things manifest to the senses."<sup>13</sup>

All terms such as 'mens rea' and the long array of words that attempt to describe states of mind must in a scientific analysis of legal ideas be replaced by functional ideas which state behavioristic attitudes. For our present purpose it is sufficient to repeat, that the effort of the jurist to analyze consciousness is futile and unnecessary.<sup>14</sup>

(3) *Outward expression.* The next element in the prevailing analysis of 'act' is the outward expression. But according to Austin "the bodily movements which immediately follow our desires of them, are the only human *acts* strictly and properly so called."<sup>15</sup> Mr. Justice Holmes puts it in still a more striking way. He says "an act is always a voluntary muscular contraction

<sup>13</sup> Holmes "The Common Law" (1881) p. 49. Cf. Levitt ("Origin of the Doctrine of Mens Rea" Ill. L. Rev. 17:117 [1922]) who, following Pollock and Maitland, ascribes the origin of mens rea in the common law to the penitential books of the ninth century. See, also, the important article of G. H. T. Malan "Behavioristic Basis of Science of Law" A. B. A. Jour. 8:737 seq.

<sup>14</sup> It is interesting to note that Holland who argues for the juristic necessity of operating with the concept of 'intention' in criminal law and for 'juristic acts' abandons that idea for contracts. He says (op. cit., p. 263) "\* \* \* when the question is once raised, it is hard to see how it can be supposed that the consensus of the parties is within the province of law which must needs regard not the will itself but the will as expressed \* \* \*." Cf. Leonhard "Der Irrthum bei nichtigen Verträgen"; Windscheid "Lehrbuch des Pandektenrechts" (9th ed. Kipp ed. 1906) I, § 69 n. l. a.; Williston "Mutual Assent in the Formation of Contracts" (1919) in Wigmore "Celebration Legal Essays" p. 525.

<sup>15</sup> Austin op. cit., I, 432: Lect. xix.

and nothing else.”<sup>16</sup> He then proceeds to say that “the chain of physical sequences which it sets in motion \* \* \* is no part of it \* \* \*.”<sup>17</sup> In another place, Austin has said that “acts (properly so called) are not injuries or wrongs, independently of their consequences.”<sup>18</sup> It is perfectly clear that when a liability is incurred for a wrongful harm, the liability is not for the act as above defined by Austin and by Holmes. It is also perfectly clear, on the contrary, that liability is imposed for having been in a definite objective relation to a harm. The basis of the application of this liability is the probability of harm flowing from the muscular movements, or the lack of them, of some person. The standard varies from case to case and is dependent on the education, character, and prejudice of those who apply it.<sup>19</sup> The standard in all cases is and must be objective, even where in the chain of physical motions there is a psychical gap, as where a master orders his servant to do an unlawful act or where the owner of a dog incites the animal by words to attack another.

If we examine the contents of any specific code we will at once encounter definitions of this sort:

Murder is the unlawful killing of a human being with malice aforethought.

Manslaughter is the unlawful killing of a human being without malice.

Larceny is the felonious stealing, taking and carrying, leading, riding or driving away of the personal goods of another.

Robbery is the felonious and violent taking of money, goods, or other valuable things from the person of another by force or intimidation.

The crime of murder is not the crooking of a finger, even though that finger was attached to the trigger of a loaded pistol which was discharged resulting in the death of a human being. The crime is the killing. Liability is imposed because of the objective relation of some person who brought it about. If

<sup>16</sup> *Holmes* “The Common Law” (1881) p. 91.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Austin* op. cit., I, 440: Lect. xx.

<sup>19</sup> Cf. *Holmes* op. cit., p. 51.

criminal punishment is inflicted for acts, then it is clear beyond any doubt that the act is the killing and is not the muscular movement which preceded it. To accept the Austinian view of the nature of an act would require a cumbersome rephrasing of every criminal code.<sup>20</sup>

3. **Austin's analysis.**—The Austinian analysis with its emphasis on physical causation reduces to a position of unimportance the legally and economically significant thing—the harm that puts the law into motion. Considered as a result attributed to a human being the act is the same whether it was willed or not willed, whether harm or not harm, whether 'iniuria' or not 'iniuria.'<sup>21</sup> The act is the prius; the question of culpability is a posterius. The act, the factual result, is a datum of the physical world; liability is a datum of juristic thought. It is an inconvenient inversion of the order of things, to attempt to isolate an intermediate act and to connect it to a state of mind on one side and to certain consequences on the other.<sup>22</sup> It is not only inconvenient to proceed in this way but it is also analytically confusing to attempt it. The more natural line of inquiry is: (1) Was there a harmful result?; (2) Is any one accountable for that harmful result? The first question is answered by evidence. The second question is answered in part by evidence showing the objective relation of the actor to the event, and in part by application of a standard to measure this objective relation.

In the ordinary case of liability the ultimate questions are

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<sup>20</sup> *Markby* ("Elements of Law" [6th ed. 1905] § 215, p. 118) confessedly follows the Austinian analysis. See, also *Cook, W. W.* "Act, Intention and Motive" *Yale L. Jour.* 26:645 (1917).

<sup>21</sup> Cf. *Beale* "Recovery for Consequences of an Act" *Harv. L. Rev.* 9: 80 seq. (1896).

<sup>22</sup> Austin's definition of 'act' is limited to "the bodily movements which immediately follow our desires of them." Whether Austin means to include *all* of the bodily movements supervening between the mental state and the external result, or only the latest stage of bodily movements preceding the consequence, is not clear and perhaps also is not important. In other words, it is not certain whether Austin's definition is of a state or a connected series of states. Salmond's analysis of act is compounded of a series of causes and effects. According to *Salmond* "Jurisprudence" (3rd ed. 1910, § 128) an act is constituted of three elements: (1) Origin (mind or body); (2) circumstances; (3) consequences.

generally so obvious that it is of little practical importance whether we think of liability imposed for causes or whether we think of it as imposed for effects. The intuition of courts and legislatures on this point has been sounder than the prevailing reasoning of jurists. Courts and legislatures impose liability primarily for what is done and only secondarily for what is caused.

If the position above taken is correct, it follows that an act is simply a certain kind of fact or, more accurately, as will be shown, the concept of that fact. It is a fact which theoretically may be fully described. Therefore, it has no duration. It is the last element for purposes of description in a complex chain of other facts. Each of these other events also may be described as an act in the sense of physical causation. They are infinite in number but the law generally deals only with those that are practically significant, such as a bodily wound, economic loss, deprivation of possession, putting in bodily fear, acceptance of an offer, abandonment of an object, death, etc. The law does not regard the series leading up to these final facts except for the purpose of determining whether there is liability.

Acts may be related (a) serially and (b) non-serially; and (i) directly and (ii) collaterally. Thus, putting a highly inflammable fuel into a furnace may cause the emission of sparks which fall on dry grass resulting in a prairie fire which spreads from field to field to a building which becoming ignited emits sparks which in turn fall on other buildings in a continuing series, etc. In this illustration each economic loss of each person in the series is a result and is therefore a result act. These results are related serially and directly. Each result in the chain is the cause of the next following result.

If, in the illustration put, sparks from the same furnace also fell at the same time into the same field causing a similar chain of results in another direction, the latter series would be collateral to the first. If, in either chain, we suppose the destruction of a factory building as a result of which the owner suffers economic loss because of inability to fulfill a manufacturing contract, the contract loss would be in the series of events but it would be a collateral result.

If the original result in the series operated as a breach of duty, all direct results in the series would be actionable but no collateral result would be actionable unless it could be traced back to a breach of duty in a direct chain of causation.

What kind of results are result acts and how these result acts are to be treated for procedural purposes (e. g., what result acts can be or must be combined in an action) depend on the details of the legal system based on its view of policy (a) of preventing vexatious litigation and (b) avoiding injustice to him who has suffered a harm. The juristic test is a simple one; a result is a result act if for any legal purpose it creates, alters, or destroys a legal relation, the demonstration of which depends on procedural remedies.

**4. Types of definition.**—From the foregoing statement it appears that there are, or may be, three main types of theory of the nature of an act: (1) The theory that an act is a muscular contraction (or a connected series of such contractions); (2) the theory that an act consists of muscular contractions, the surrounding circumstances, and the consequences; (3) the theory that an act is the legal concept of the result either of a bodily movement or of a result attributable to its absence. The last theory is the one which the present discussion seeks to support. There are, or may be, subordinate theories under each of these three main groups which predicate an accompanying state of mind. There is still another classification of these theories into three types: (1) The cause type; (2) the effect type and (3) a cause and effect type.

While it is true that in the ordinary case the practical needs of justice are realized without attempting a thoroughgoing analysis of the juristic foundations of liability, and while it is also true in such cases that the courts need not concern themselves with the various types of theory above sketched, yet there are instances where there is no escape from theory even though it be inarticulate and even though it finds a surrogate in the sound intuition of the judge.

We believe it has already been sufficiently shown that the law does not impose liability for an act that consists solely of



a contraction of the muscles. If liability is imposed, it is because the contraction of muscular tissue has been followed by a harmful result to some person. The act for purposes of liability is the legal concept of that harmful result and nothing else. The reason for imposing liability is that some other person is accountable for that harmful act because of his preceding acts.

If a gate-tender falls asleep at his post and a railroad fatality occurs because of the failure to lower the gates at the proper time, the fatality is the (negative) act of the gate-tender. It is a result for which he is responsible and liability is imposed because of two other facts: (1) That he acted in assuming the duties of his employment; and (2) that after so acting he later failed to act when he ought to have acted.

5. *Conceptual nature of acts.*—An act in the *juristic* sense is not a movement of the muscles; it is not something in motion. Nor is an act an objective fact; it is not an objective result. It is in strictness the juristic concept of an assumed objective result, and something more. Normally, the concept of the objective result and the objective result itself should coincide, but this complete coincidence is perhaps no more possible in law than it is in epistemology. Objects and concepts do not coincide, and this view is carried so far as to affirm that the object, the thing itself, can never be known. The problem here is analogous. The function of acts is to produce jural phenomena, just as sensations and perceptions produce other psychic phenomena. The cause of a jural phenomenon is the jural perception of something in the outer world. Whether this perception agrees with the external fact can never be known absolutely. The law by means of a multitude of rules of evidence and a more limited number of rules of persuasion has determined the procedure for the creation of its concepts. In other words, the perceptive juridical process is codified. Unless it may be assumed that this rigidity of method produces a more accurate conceptual result (and there is much reason to doubt it), then the probability of discordance between the objective result and the juridical concept of that result is increased, and it follows, therefore, that the distinction here made is not merely a juristic

refinement, but is a necessary postulate for an accurate formulation of jural causation. There is involved here an unavoidable fiction that the juridical perception of today coincides with the conceptual act of perhaps many years before.

Another proof of the conceptual nature of acts is the conceptual nature of a jural relation. An objective fact can not produce a conceptual fact. A conceptual fact can only be explained by another fact of a similar nature with which it can have a connection. The concept of jural relation can be connected only with an act which is itself conceptual; in no other way can the facts of the external world be connected with jural phenomena.

6. **Acts are the legal concepts of results.**—We have already seen that an act in the juristic sense is not the result itself since that result can only be jurally known by the jural concept of it. That jural concept is the jural act. We have here to show that the jural concept necessarily must be a result-concept, and that it can not be any motion, or state of facts, or concept of either of them anterior to the conceptual completion of an objective series of movements.

In the prevailing analysis of acts, it seems to be assumed sometimes that the only jural acts are those that are tortious or criminal. That limitation is clearly erroneous. The term 'act' has an application to all jural consequences that are attributable to legal persons through the activities of human beings. Wills, contracts, grants, assignments, releases, waivers, forfeitures, estoppels, etc., are the result of jural acts in the same way as are torts or crimes.

No one would think of saying that a contract, whether oral or written evidence of it is found, is created by muscular contractions. The same muscular contractions can be reproduced with a pen from which no ink flows as with a pen that emits ink. One of these series of muscular contractions will eventuate in a will or in a contract good against the statute of frauds, while the other series of muscular contractions will produce no legal result whatever.

A legal relation does not come into being at a distance any

more than one body can influence another at a distance (without some emanation from one to the other or some equivalent condition producing direct contact). Jural relations are created by acts or events and these acts or events must synchronize with the relation. They can not be separated without destroying the connection between them. It follows, therefore, that a jural act must be directly connected with the jural result (the relation).

In the prevailing analysis of acts, there is a hiatus between the act and the ensuing jural relation. In some mysterious way, or by arbitrary assumption, a jural relation is thought of as arising following an interval long or short after the act is completed. Thus if *A* puts an obstruction in a public highway and goes away and, hours or days afterward, *B* is hurt by the obstruction, it is supposed by the prevailing theory that *A*'s act was jurally complete when he placed the obstruction in the highway. *B* is hurt, not by *A*'s act, but as a consequence of *A*'s act. A similar analysis is not carried out for contracts. There are not acts, consequences, and jural relations, but only jural acts and jural relations. The jural act of acceptance of an offer directly creates a jural relation; it does not create an intervening consequence. It is not apparent that a different analysis of act is needed for wrongful acts than for lawful acts. If there is a breach of contract, the legal concept of all the objective facts sufficient to destroy the contract relation and to create a new relation requiring the payment of damages are presented by the breach without an intervening element called a 'consequence.' The measure of damages, however, is affected by the consequences of the breach.

**7. Two kinds of liability.**—Liability arises in two distinct classes of cases: (a) Upon the occurrence of objective harm; and (b) without objective harm. Usually a tort liability does not arise unless there is objective harm, but this is not universally true. A trespass on land may be economically beneficial to the landowner or may be of no economic importance whatever, and yet there is a violation of the owner's claim. Again, there are kinds of libel which are actionable without proof of special damage. In contract obligations, a breach of contract is action-

able without proof of objective harm. It is not improbable that the need of showing an objective harm in one class of cases has led to the view that for juristic purposes there is a universal need of separating acts and consequences. To avoid misapprehension, we do not deny that human acts whether regarded as simply muscular contractions or regarded as the consequences of such muscular contractions may be followed by other objective states. We are not dealing here with causation or with the underlying physical phenomena upon which jural phenomena are based. Our concern is strictly to inquire into the technical juristic meaning and nature of jural acts. Jural acts are not created or caused by physical acts nor are they the consequences of physical acts. Jural acts are, however, based on such physical phenomena. The connection is not causal or linear, but one of parallelism.

*Physical acts and legal acts.* If there is any convenience in regarding physical acts in one class of cases as having physical consequences and in another class of cases as not having physical consequences, that convenience does not extend to jural acts. A jural act has only one kind of consequence; it creates, modifies, or destroys, a jural relation. Jural acts are the immediate and efficient causes of jural phenomena. They do not admit in any instance of a hiatus or interval before the resulting jural phenomenon occurs. These jural acts are the jural concepts of all the underlying physical facts constituted by the intervention of human forces moving in a world of other forces animate and inanimate, which in the eye of the law are regarded as important enough to effect changes in the spheres of jural ideas.

The distinction between a physical act and a legal act is this: a physical act is one of the elements in a chain of physical causation; a legal or jural act is one of the elements in a chain of jural causation. The prevailing analyses of acts are in effect analyses of physical acts and not of legal acts. We do not minimize the importance of physical causation as a basis of legal ideas, but it must be insisted that physical causation is simply the evidentiary preliminary upon which jural causation is founded. Physical causation is a highly complex process, but jural causation is in contrast a simple conceptual process which

generalizes into two elements the numberless elements of physical causation.

8. **Juristic and legal concept of 'acts.'**—While a jural act must have a consistent logical character, it does not follow that the practical legal view of the nature of an act requires a different manipulation. Legal act and jural act are not precisely the same. Practical law and juristic science necessarily speak different languages but the underlying ideas are the same. Disharmony on the point under discussion may easily be avoided by making a distinction between physical acts (which may be defined as seems best) and legal or jural acts which can with logical and scientific accuracy be understood only in one way.

No substantial distinction, therefore, can be admitted between the legal and the juristic concept of a jural act. Formal distinctions may, however, be conceded growing out of the practical character of legal thinking in contrast with the more logically refined and detailed process of juristic reasoning. The legal concept of an act is the objective result of physical acts in a causal sense leading immediately to a legal phenomenon (i. e., the creation, modification, or destruction, of a legal relation). The juristic concept simply refines the definition by importing into it the conceptual quality which it requires for scientific accuracy. An illustration of another sort will assist in making this point clear. The legal concept of personateness recognizes 'natural' persons (i. e., human beings) and 'artificial' persons (e. g., corporations). The juristic concept of personateness admits no such grouping and affirms that all juristic personateness is technically artificial.

Another formal distinction that may be conceded is that an act in the legal sense is or may be an object-result as above defined without the collateral elements of governing legal rules, while in the juristic sense all the collateral elements necessary to give the given result a legal character are a part of the act. Thus, an act in the legal sense is simply an objective result or the concept of an objective result; it is not, or at least need not be, as such, a crime or a tort because the legal rules governing the matter are no part of the physical result. In a juristic sense,



the conceptual act includes all the relevant causative elements necessary to effect a jural relation, including the existence of governing legal rules. The act is not simply a concept of an objective result but it also is a crime act, tort act, contract act, etc.

There are, therefore, as the foregoing discussion attempts to show, three separate ideas. First there is a *physical* act in the sense of that which is the physical cause of certain consequences. Next there is a *legal* act in the sense of the consequences of physical causation. Lastly there is a *jural* act in the sense of a concept of all the facts that immediately and directly create, modify, or destroy a jural relation. Legal and jural acts are not in conflict with each other and differ only in extent of meaning. Legal and jural acts, however, stand in contrast to physical acts. The various meanings attached by jurists to the term act may be due to independent recognition of the need of differentiating the three meanings already explained. There is practical need for all three ideas and they can readily be differentiated by qualifying the act in accordance with the meaning intended.

9. **Positive and negative acts.**—(1) In a narrow sense there are only positive acts, or, as Austin has put it, simply acts.<sup>23</sup> If there are no bodily movements then there is no act. This view proceeds from Austin's theory of the nature of an act which disregards in the definition the consequences of acting. It is a view logically consistent with that theory.

(2) There is another view widely accepted that acts are positive or negative; they are acts of commission and acts of omis-

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<sup>23</sup> According to Austin (op. cit., I, pp. 376, 438), there are: (1) *Acts* ("the bodily movements which immediately follow our desires of them"); (2) *forbearances* ("the not doing a given act with the intention of not doing it"); (3) *omissions* ("the not doing a given act, without adverting [at the time] to the act which is not done"). This classification is logically complete but it offers three objections: (1) There is no generic name for these three instances of acting; (2) it relies on a mental factor which can not be applied with objective certainty; (3) it does not correctly or logically describe the 'act' even if taken in the sense of a bodily movement since the emphasis is wholly on a state of mind which precedes the bodily movement.

sion. "A wrongdoer either does that which he ought not to do, or leaves undone that which he ought to do."<sup>24</sup> This terminology is an improvement over Austin's in that it gives to the term 'act' a generic meaning. It suffers, however, from a serious defect of its own in that it makes the nature of an act depend upon an extraneous jural fact, i. e., the existence of a duty and the method of its violation. It lacks definitional ultimateness. An attempt to apply this idea, however, presents difficulties. This may be seen in the following illustration.

Primus has a claim to corporal integrity. Every other person owes a duty not to infringe the corporal integrity of Primus. The corporal integrity of Primus may be infringed by bodily movements of Secundus which have a direct physical connection with Primus; or the corporal integrity of Primus may be infringed by the absence of bodily movements of Tertius which lead to the same harmful result. It is clear enough that the act of Secundus was one of commission; he did what he ought not to do. But did not Tertius also do what he ought not to do? Did he not cause a corporal harm to Primus? In both instances the duty was negative—not to bring corporal harm to Primus. A negative duty can be violated only by a positive act. Suppose, now, that Sextus infringes the corporal integrity of Primus by striking him with an automobile. Did Sextus do what he ought not to do; or did Sextus leave undone what he ought to do; or, perchance, did Sextus in the circumstances do what he ought not and also leave undone what he ought to do? We believe the only escape from this and similar difficulties lies in another approach.<sup>25</sup>

(3) Acts can best be classified as positive or negative by considering them objectively and stripping them of all subjective

<sup>24</sup> *Salmond* op. cit., § 128; cf. *Bentham* "Principles of Morals and Legislation" (1789) chap. vii.

<sup>25</sup> *Salmond* (op. cit., § 128) seems to limit the application of positive and negative acts (at least his discussion of the terms is so limited) to acts of wrongdoing; but such a view is inadmissible. The ideas are universal and apply to all the various kinds of acts in every legal relation. Thus an act of performance may be either positive or negative. The payment of a debt is a positive act; the refraining from a trespass is a negative act.

or jural elements. Proceeding objectively, an act is carried back for purposes of legal reasoning to a human being. If the result is one which is directly connected in a physical chain of sequences with the bodily movements of a person, then the result is the *positive* act of that person. If the result is not so connected then the result is, as to that person, a *negative* act. Whether the person is held accountable for the result, whether as to him positive or negative, is not here the question. The point is to find a criterion which has universal objective validity and logical coherence. Applying this criterion to the example last considered, there appears to be no difficulty in saying that if Sextus strikes Primus while Sextus is driving his automobile, no matter what may be the intervening circumstances (last clear chance, etc.), the act is a positive act.

10. **Classification of negative acts.**—Negative acts require to be further classified. They may be *omissive* or *commissive*. If a landowner neglects to warn an invitee of a hidden danger not created by the landowner, the harm results from a negative act of omission. If a master orders his servant to commit a tort, as to the servant the act is positive; as to the master, the act is a negative act of commission. Negative acts of commission may be direct or indirect. When the master orders the servant to commit a tort, the act as to the master is a negative act of direct commission. Where the master is responsible for a tort of the servant committed within the scope of his employment, the act as to the master is a negative act of indirect commission.

Since several ideas are involved in this analysis it may be useful, so far as it has any importance, to show the classification by means of the following diagram.

TABLE NO. I

ACTS { POSITIVE—direct physical connection of force of an actor with an objective fact (and exceptionally a subjective fact).  
NEGATIVE { Omissive { Direct } Involving the intermediation  
                  Commissive { Indirect } of an intelligent force.

Negative commissive acts are positive actings by physical con-

nections of force of intelligent forces (e. g., of men and of the lower animals, but not of the forces of inanimate nature), the results of which are imputable for purposes of responsibility to another. Acts may be negative and omissive by the intermediation of an intelligent intermediary force (e. g., the negligence of a servant), but in this case there is no need of further subdivision since such omission can be neither direct nor indirect as to the master. A crucial illustration of the application of this analysis may be put as follows: *A* stretches wire across a public highway, holding one end of the wire and *B*, while passing along the highway, comes into contact with the wire as a result of his own motions. What is the objective character of the act? It would seem to be a negative act of direct commission.

In the illustration last put, the stretching of the wire is *A*'s positive act. The harmful result suffered by *B* is *A*'s negative act and *B*'s positive act. The harmful result is the significant act which the law notices for the purpose of imposing liability. This harmful result therefore is the *legal* act as distinguished from the originative *physical* or causative act on one hand and the *jural* (i. e., legal relation producing) act on the other. This illustration presents a difficulty which serves to distinguish *legal* acts (i. e., acts which the law will notice for the creation of legal consequences) and *jural* acts (i. e., which directly and immediately produce legal consequences). *A* owed *B* a duty not to violate his claim of corporal integrity. This duty was a negative duty which could only be infringed by a positive act, and yet we have seen that the harmful result was *A*'s negative act. The explanation of this apparent contradiction is this: *A*'s negative duty was a *jural* duty; it required a negative *jural* act (i. e., not to infringe *B*'s corporal integrity); *A*'s *jural* act was a positive *jural* act produced by means of a negative *legal* act. If *A* commits a battery on *B*, the violation of legal duty is a positive *jural* act and the legal act by means of which *A*'s duty is violated is also a positive act. It is necessary to observe that the above classification of positive and negative acts is limited to *legal* acts. A generalization that follows is that positive duties may be discharged by negative legal acts and that negative duties may be violated by negative legal acts.

11. **Internal and external acts.**—There are three views on this matter: (1) That there is no distinction between internal and external acts <sup>26</sup>—that there is only one species of act which involves (a) a psychic content and (b) a physical element; <sup>27</sup> (2) that there are internal acts, or acts of the mind, and also external acts, the latter of which are constituted of psychic and material elements; <sup>28</sup> (3) that there are internal acts and external acts, but that these acts are independent data for legal purposes. The view of the present writer gives adhesion to the last view.

If the law for any purpose takes account of reflexes <sup>29</sup> stopping short of physical expression, then internal acts accordingly must be noticed as one of the fields of law. There are many instances where this appears to be the fact. Some typical instances are estoppel from silence, admissions from silence, tacit ratification, negligence by omission.

If a man perceiving the mistake of another who is about to build on the former's land, stands by, is the act of the land-owner an internal act? If there is a determination of the will to remain silent, that determination of the will certainly is an act. But does the law act upon that factor? It would seem not to do so, but rather to operate upon the effect produced on the

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<sup>26</sup> *Del Vecchio* "The Formal Bases of Law" (Boston 1914) § 90, p. 128; *Austin* op. cit., I, 433.

<sup>27</sup> The argument of Schopenhauer, ("Die Welt als Wille und Vorstellung" § 18, cited by *Del Vecchio*, op. cit.) may be noted: "Acts of will and physical acts are not two distinct things joined in a causal chain; they do not stand in a relation of cause and effect but are one and the same." As *Del Vecchio* puts it, "to hold the relation of the will to its acts as causal is equivalent to saying that will acts upon its acts which is arguing in a circle": *Del Vecchio* op. cit., § 89, p. 127, n. 7.

<sup>28</sup> *Salmond* (op. cit., § 128): "Every external act involves an internal act which is related to it; but the converse is not true, for there are many acts of the mind which never realize themselves in acts of the body." Cf. *Bentham* "Principles of Morals and Legislation" (1789) chap. vii. It may be noted here, although the detail of the matter must be passed over, that *Bentham* (chap. vii) classifies acts into the following groups: (1) Positive and Negative (substantially in the same sense as shown above); (2) Internal and External (acts of discourse being a mixture of the two); (3) Transitive and Intransitive; (4) Transitory and Continuing; (5) Divisible and Indivisible.

<sup>29</sup> We use the term in a broad sense to include voluntary or involuntary movements of mind or matter. In this sense a lunatic, a hypnotic subject, or one under duress may act. Responsibility in these cases is another question.



builder. It is a case of misrepresentation by passive assistance.<sup>30</sup> The act of the builder was clearly a positive external act. It is also the landowner's act by contribution to the result. As to the landowner therefore, it is also an external act.<sup>31</sup> Other instances will submit of a similar analysis with the result that we find that the law actually deals only with such acts as are represented by physical situations or by mental states flowing from physical situations.<sup>32</sup> But while this statement is true of the law as it is, it is not a necessary result, since conceivably the law might deal with internal acts if it thought it practicable to attempt it.<sup>33</sup>

The doctrinal theory, indeed, is that the law does deal with internal acts. This is seen in all those instances where a state of mind is premised as a ground of responsibility. Thus for criminal liability it is generally believed that 'intent' is necessary. Now this intent can be nothing other than a mental act. Where knowledge of a fact is assumed to be the foundation of responsibility whether civil or criminal, such knowledge itself must often be considered as an internal act.<sup>34</sup>

For example, where there is a non-disclosure of an essential fact known to one and unknown to another, this non-disclosure may be due not to an exercise of the will choosing to remain silent where good faith requires speech, but, on the other hand, it may be due to indifference, or indecision, or forgetfulness. This illustration, too, may serve to show how difficult it necessarily is to base any sort of responsibility on a particular state of mind.<sup>35</sup>

<sup>30</sup> Ewart "Principles of Estoppel" (Toronto 1900) p. 88.

<sup>31</sup> It may be worth observing that while the act is external, it is, as to the landowner, a negative act. It is a negative act of direct commission.

<sup>32</sup> Cf. *Del Vecchio* op. cit., § 95, p. 139. As in the case of mental harms (if and when actionable). An interesting example of this kind of mental harm is suffering due to failure to deliver a telegram. Here the act is the mental harm; as to the telegraph carrier it is a negative act; it is also an internal act (or event) as to the person who suffers mentally.

<sup>33</sup> Cf. *Del Vecchio* op. cit., § 95, p. 139.

<sup>34</sup> Austin's editor, Mr. Robert Campbell, ("Jurisprudence" 1873, 4th ed., I, 427, n. 71) asserts that in spite of Austin's rejection of internal acts, he recognized 'meditation' as an act. Mr. Campbell then says: "And it is difficult to see why 'cogito' should not be classed with acts just as much as 'curro' or 'haurio'."

<sup>35</sup> *Del Vecchio* (op. cit., pp. 130 seq.) shows that ancient psychology

12. Acts in the legal sense are the results of human reflexes or the absence of them.—Since animals other than man have the faculty of acting,<sup>36</sup> why do we not include the reflexes of the lower animals in the juristic category of 'acts?' It is true that a dangerous dog may bite and it is also true that the owner may be responsible for the harm done by the dog in the same way that he is held responsible if his servant in the course of his employment harms another. If what the servant does is an 'act,' why is not what the dog does also an 'act?'

In a wide sense, the term 'act' may include the reflexes and the result of them of any living organism,<sup>37</sup> but if the technical meaning is extended beyond the reflexes of human beings there will be difficulty in drawing the line between animate and inanimate matter. The result of a stroke of lightning or of a wind-storm, if we disregard the mental element, is as much an act as a result produced by the muscles of a man. In order, therefore, to find a sharp line of logical separation we may include as 'acts' in the strict legal sense (a) the results of human reflexes; (b) the results legally attributable<sup>38</sup> to the absence of a human reflex. In the strictest sense, only, the results of

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treated will as subordinate to intellect while modern psychology makes will the basic fact, and this apart from the metaphysical theory of voluntarism. According to Del Vecchio "will and act are essentially correlative" and will is the primary and irreducible principle of subjective being."

<sup>36</sup> I. e., of performing acts.

<sup>37</sup> The usage in the application of the terms 'act,' 'acting,' and 'action' is not settled, and although it has been suggested that an effort to confine these terms to special functions will be confusing (*Salmond op. cit.*, § 128), yet we believe that is one of the risks that legal science must take. We therefore use these terms here in the following way: (1) *Act* as already defined having three senses: (a) *lato sensu*, being all attributable results of the reflexes of living organisms; (b) *strict sense*, all attributable results of the reflexes of human beings; (c) *strictest sense*, the positive acts of human beings. (2) *Acting*, the series of concrete movements leading from a defined center whether animate or inanimate to a given result. (3) *Action*, the same series of phenomena or any one of them considered in an abstract sense. Cf. *Jevons* "Elements of logic" (Hill's ed., New York 1883) § 6: "Concrete and Abstract Terms"; cf. *Bentham* ("Principles of Morals and Legislation" [1789] chap. viii), who employs the term 'action' to include both the 'act' and the consequence.

<sup>38</sup> We make no effort here to consider causation and we have avoided use of the term in speaking of 'acts.' It is in connection with causation that 'physical' acts have their proper application.

human reflexes are 'acts.' All other results, no matter whether flowing from a living organism or not, may be called 'events.' Both 'acts' and 'events' may be grouped under the term 'facts.'<sup>39</sup>

Our question, however, yet remains unanswered,—why the actions of the lower animals are not acts in the jural sense. The proper answer, we believe, is that since legal relations can subsist only between persons, no act in a legal sense can be required of an animal nor can a jural act be projected against an animal. While the muscular movements of animals could be called acts in a juristic sense, it would be neither convenient nor desirable since such movements can never be the content of legal relations.<sup>40</sup>

**13. Problems of time and space.**—While analysis of the concept 'act' is rarely considered by the courts, and, in general, is unnecessary, there are two classes of instances where such analysis is of major importance. The first is where the series of facts leading from a human reflex and ending in a given result or results extends over two or more territorial jurisdictions. The second is where the legal condition of the actor undergoes a change before the result is reached. The first involves a problem of space; the second involves a problem of time. Some of these problems may now briefly be considered.

(1) *Space.* If *A* in state *X* puts in motion a force which strikes *B* in state *Y* and which has a further result (e. g., death) in state *Z*, where was the act done? The prevailing common-law answer is that the act is done where the physical contact between the person harmed and the outside force takes place.<sup>41</sup> This is a convenient and rational solution; it is based on the idea that the place where the duty was first invaded controls,

<sup>39</sup> *Holland* "Jurisprudence" (13th ed. 1924) p. 93.

<sup>40</sup> *Salmond* "Jurisprudence" (3rd ed. 1910) § 109: "The Legal Status of the Lower Animals."

<sup>41</sup> Cf. *Beale* "Recovery for Consequences of an Act" *Harv. L. Rev.* 9: 80 (1896); *Goodrich* "Tort Liability and the Conflict of Laws" *U. of Pa. L. Rev.* 73: 21, n. 8, cases (1924); *Magruder* and *Grant* "Wrongful Death Within the Admiralty Jurisdiction" (1926) *Yale L. Jour.* 35:395; *Salmond* *op. cit.*, § 131: "The Place and Time of An Act."

and that the further results (acts) are accessory to the principal (initial) act. The difficulty has been in not perceiving that in such cases there are plural acts instead only of one act. If a bullet is fired in state *X*, that is an act and there is no theoretical reason why that act might not subject the actor to liability in state *X* (if the territorial theory of liability is to be strictly adhered to) <sup>42</sup> upon a condition subsequent of a given harmful consequence in state *Y*, or state *Z*.<sup>43</sup> Upon the same basis, if the bullet strikes *B* in state *Y* there is no theoretical reason why state *Y* might not impose criminal liability upon *A* for that act in state *Y*, and again, state *Y* might upon the same ground impose another more extensive liability for the act in state *Y* annexed to a condition subsequent of a further harm elsewhere. And, finally, if death occurs in state *Z*, that state might impose criminal liability for that act. The present rules probably work out with reasonable satisfaction, since instances which raise these problems do not commonly occur.

Another difficulty has been presented by the effort to connect a state of mind with one or more of the series of consequences flowing from a reflex. The judicial results at this point exhibit much confusion and show the need of a logically sound theory of the nature of 'acts.'<sup>44</sup> An act is an objective fact; it is a datum of nature to which the law may or may not attach legal consequences. It seems to us quite impossible to say that

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<sup>42</sup> It is strictly adhered to in criminal liability upon the view that no state will inflict punishment for an act done elsewhere. The theory is also adhered to in civil liability by a singular confusion of thought. In civil law, in American jurisdictions, if there is tort liability at the 'locus commissi,' it is also a tort at the foreign forum if the defendant carries it there: Cf. *Slater v. Mexican Nat. R. Co.* (1904) 194 U. S. 120, 48 L. ed. 900. In a word, in criminal liability in all jurisdictions, acts and responsibility are local, but in civil liability in American jurisdictions the act is local but responsibility is a floating one. The English rule, at least as between English subjects is logically more consistent. By that rule, the act is local but responsibility is not localized with the act. There may be tort liability in England for an act which is not locally a tort: *Phillips v. Eyre* (1870) L. R. 6 Q. B. 1.; *Machado v. Fontes* (1897) 2 Q. B. 231; *Scott v. Seymour* (1862) 1 H. & C. 219.

<sup>43</sup> In effect, this reasoning is applied in dealing with criminal attempts except that there is not and can not be a condition subsequent in attempts. Cf. *Beale "Criminal Attempts"* (1903) Harv. L. Rev. 16: 492.

<sup>44</sup> Cf. *Regina v. Keyn* (1876) 2 Ex. D. 63; *Salmond* (op. cit.) § 131; *Terry* "Leading Principles of Anglo-American Law" (Tokyo 1884) p. 598.



if an act is willed it is localized at one place, while if the act is unwilled it is localized at another place. The act must have the same situs in all cases without respect to the causes, physical or mental, that produced it. The question of responsibility can in no manner change the nature of the act.

(2) *Time*. If *A* puts in motion a force which produces a result after *A*'s change in legal condition, what is the legal effect, if any, of the act? The question may arise in contract law, in tort law, and in crimes. If an infant makes an offer by post which is received after the infant attains his majority, and is then accepted, is there an enforceable contract? If *A* excavates on his land causing a subsidence on the adjoining land of *B*, but after *A*'s death, was there an act? and if so, was it *A*'s act? and if so, who is responsible? <sup>45</sup> If *A* at *B*'s request provides *B* with poison which *B* voluntarily takes and *B* dies, is *A* guilty of any criminal act, and if so, what is it?

If, for these problems, we make an effort to apply the theory of 'acts' advanced above, we will arrive at the following results:

(i) If the offer is received after the infant attains his majority, the act of offer is then complete; it may therefore be seized upon to constitute an enforceable contract. An acceptance mailed while the offeror was still an infant but received after his majority would not be a contract binding the infant. If, within the period of reasonable time to accept an offer the infant attains his majority and thereafter the offer is accepted, there should not be a contract. If at the moment of accepting an offer, the offeror is dead (and his persona does not survive), there can be no contract even though there may be some other form of responsibility. <sup>46</sup>

(ii) When an adjoining owner's land subsides after the death of the person who made the excavation, the act or event, is the subsidence. It is necessary that there be a legal person if there

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<sup>45</sup> See *Salmond* op. cit., § 131, n. 5.

<sup>46</sup> So far as authority may be found on these propositions, it appears to be highly conflicting, showing contradictions in the theoretical foundations upon which answers must depend. Cf. *Holland* "Jurisprudence" (13th ed. 1924) p. 270 seq.



is an act. There is an act or event (i. e., the subsidence) by hypothesis, but is there a legal person? It is not sufficient that there *was* a legal person. 'Act' and 'person' must be coincident.

There seem to be two possible solutions of the problem: (a) We may hold the actor liable for the excavation upon a condition subsequent of harm by the subsidence. That view is not tenable. It meets the need of having a coincidence of "act" (i. e., the excavation) and "person"; but it fails in that it imposes a liability for an act (i. e., the excavation) which is not in itself harmful or unlawful. Annexing a condition subsequent does not alter the intrinsic nature and quality of the act. (b) Since neither executors of the actor nor successors in title can be held liable upon any sound theory, there remains only to extend the sphere of the actor's person<sup>47</sup> to embrace in point of time the culpable act (i. e., the subsidence). That view produces a just result holding the actor's estate liable for the harm and it avoids the inelegant disruption of act and person.

(iii) Where *A* at *B*'s request and without inducement on *A*'s part provides *B* with the means for accomplishing *B*'s suicide and *A* not being present, there is no crime either by *A* or by *B* in the absence of a statute specifically dealing with such a case as put. The act (i. e., the death) is not the act of *B*.<sup>48</sup> On the facts stated the act is not that of *A*.<sup>49</sup> On different facts (e. g., of inducement) *A* might be held as a principal, but *A* could not be held as an accessory where the rule prevails that the principal must be triable. At common law, suicide was a crime punished by indignities to the dead body and forfeiture of goods.<sup>50</sup> Since death is the act and since the act and a person must be coincident, it necessarily follows that where suicide is a crime

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<sup>47</sup> An effort will be made elsewhere (chap. xvi) to justify this solution. For the present we may say that it involves no more of fiction to extend a legal *persona* to a dead man than to attribute a legal *persona* to a living one.

<sup>48</sup> *Terry* "Leading Principles of Anglo-American Law" § 78, p. 63: "A person's birth or death is not his act even though the death be by suicide."

<sup>49</sup> Contra, *People v. Roberts* (1920) 211 Mich. 187, 178 N. W. 690; see a valuable unsigned comment criticizing this case: *Yale L. Jour.* 30: 408.

<sup>50</sup> *Bl. Com.* iv. 189.

the legal person must survive, if only for a moment, the fact of death.

14. **Jural consequences of acts.**—Some acts (in the objective sense) have jural consequences; others do not. If *A* invites *B* to dinner, or if *B* accepts the invitation, there are acts, but no legal consequences flow from them; in a word, no legal relations result. If *A* and *B* enter into a compact without consideration which by assumption would be enforceable if consideration were present, there are acts on both sides but there is no contract; no legal relation has sprung from the compact. In the latter case there is not even a mesonomic relation since the element of consideration can not be supplied independently by unilateral act. That is to say, if a compact is made without consideration, the party seeking the benefit of the compact can not later by his own act of choice validate the compact by a tender of consideration. What the consideration shall be is a formal element of a contract which requires a bilateral operation of offer and acceptance in equal degree with the substantive elements of a contract. Moreover, the formal element can not stand alone and it is meaningless without the substantive element. A promissory agreement, therefore, without a bilateral accord respecting consideration has no constraining operation in law either actually or potentially.

15. **Unlawful acts.**—Unlawful acts have jural consequences in two ways: (1) They may destroy legal relations, and (2) they may create new legal relations.

If *A* defaults in his contract with *B*, the default has destroyed the contractual claim of *B* and it has at the same moment created a new claim in *B* to have damages from *A*. Again, if *A* commits a battery on *B*, *B*'s claim at that moment is destroyed to be replaced by a claim to damages. The only difference in these two examples, one of contract and the other of tort, is that the contract claim is not a self-renewing claim; there is but one such claim. In the tort case, the claim of personal integrity is self-renewing; when one claim is destroyed it is at the same moment not only counterbalanced by a claim to damages against

the tortfeasor but it is immediately succeeded by a new claim of corporal integrity. (The detail of that discussion involving also the difficult juristic problem of syncopation of acts does not fall here.) To put yet another example, if *A* commits the crime of forgery, he has destroyed his duty owed to the state and has subjected himself to the power of prosecution by officers of the government. The duty which has been destroyed is also self-renewing as in tort law. In all of these instances a legal relation has been destroyed and a new legal relation has been created.

Not all unlawful acts, however, have the same operation; that is to say, not all unlawful acts have a constitutive operation. For example, a statute may forbid certain kinds of matrimonial unions and violations may be dealt with in one of three ways:

(1) The marriage act may be treated as a mere nullity with no other sanction. In this case, there is neither a destruction nor creation of a legal relation. The sanction of nullity attaches directly and immediately to the unlawful act without the intermediation of a jural relation. In strictness, there can be no legal relation between sovereign and subject although for convenience duties to the sovereign and claims against the sovereign may be treated as types of jural relation of an inferior order, but the idea of a power relation in which the sovereign is dominus against a subject does not fall within the orbit of convenience. A still more definitive reason for excluding the idea of relation in the imposition of an automatic sanction is that the sanction is an event contemporaneous with the unlawful act; there is wanting the static interval necessary to the existence of a legal relation.

(2) The unlawful act may be allowed to have its ordinary operation but a penal sanction may be inflicted upon the wrongdoer. Thus, an unlawful marriage may be treated as a valid marriage but the contracting parties may be punished for their wrongdoing. In this event, the forbidden act is constitutive of legal relations of two kinds: (a) The marriage relations; (b) the power of the public prosecutor to initiate a penal sanction.

(3) Lastly, an unlawful act may be treated as a nullity and it may also be visited by an executive penal sanction.

16. **Lawful acts.**—Lawful acts fall into three groups with respect to their function of creating legal relations:

(1) Lawful acts may be such as create a capability of constraint of the physical freedom of one person in favor of another. The typical illustration for such an act is the acceptance of a contractual offer. Acceptances of contractual offers are constraining acts (i. e., the jural effect of such acts is to create a relation that constrains) and they create zygnotomic relations.

(2) Lawful acts may be such as do not directly create a capability of constraint of physical freedom. If a contractual offer is made, the offeree is not constrained by the making of the offer. It is true that he may not use the words, "I accept," in the hearing of the offerer without a resulting constraint of physical freedom, but the point is that the offer itself does not constrain anyone. It is a mere preliminary which may or may not eventuate in constraint of physical freedom. Acts of this class create only potential relations (i. e., mesotomic relations). They may be denominated non-constraining acts.

(3) Lawful acts may be such that while directly, or while not directly, creating a capability of constraint of physical freedom, yet may be altered by another jural act. Acts of this class may be denominated unconstraining acts. There are two classes of such acts:

(i) *Voidable acts.* Voidable acts create jural relations which have all the qualities of enforceable relations as against all persons except the ones who may avoid them. Thus, if an infant makes a grant of land, the grantee becomes effectually owner of the land as against all persons except the infant grantor who has the nexal power to avoid the conveyance. Unless the nexal power of disaffirmance is exercised, the power relation in the lapse of time will become extinguished. This type of act (voidable act) may be formulized as follows: its legal effect perdures until disaffirmance in apt time, or, more briefly, it is good *until*, etc.

(ii) *Ineffective acts.* Ineffective acts also create jural rela-

tions, but they have no enforceable effect until another jural act intervenes to alter the jural quality of the ensuing relation. They bring into existence a substrate<sup>51</sup> which may be changed into a zygomic relation. Thus, the executory promise of an infant can not be enforced against the infant's plea of minority, nor can it ever be enforced unless affirmed by the infant after attaining his majority. Ineffective acts may be formulized as not having a constraining force until affirmed, or, more briefly: Not good *unless*, etc.

A distinction must be noticed at this point between illegal acts that are visited by the sanction of nullity and ineffective acts. So-called 'void' acts can not be validated. For example, a promise to perform an act which is contrary to law can not be made valid by the addition or intervention of any new jural fact. The inherent vice of the transaction will extend to any new arrangement, whatever the form of it, if the illegal element remains. An ineffective act appears to be in no better case than a void act, but it differs from a void act in this, that an external fact may give it constraining force. A void act has no jural substrate and it can not be aided by another external fact.

The question is sometimes raised whether there is any juristic proof of the supposed jural substrate in ineffective acts. Put in another way, the question is whether an ineffective act can create a jural relation of any kind. We believe the problem submits of clear juristic proof, and the demonstration runs as follows:

An ineffective act, (let us say, for example, the act of *A* assuming to act without power as the agent of *P* in making a contract with *T*) has no constraining force. In the example given, *P* and *T* are in relation but there is no constraint in this relation. If *P* ratifies, as he may, the element of constraint is introduced by a fact which standing alone has no jural effect whatever. The proof lies in this, that the external fact of ratification (insufficient in itself to be the content of a constraining

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<sup>51</sup> This apt term was used in the leading case of *Whitney v. Dutch* (1817) 14 Mass. 457.



relation) superadded to the unconstraining contract relation changes the jural character of the latter relation to a constraining relation. Symbolically the demonstration may be put as follows:

1.  $T \xleftarrow{+} P =$  no physical constraint.
2.  $P \xrightarrow{+} T =$  no physical constraint.
3.  $P \xrightarrow{+} T + T \xleftarrow{+} P = T [ \xleftarrow{+} ] P =$  physical constraint.
4.  $\therefore T \xleftarrow{+} P = T ( \xleftarrow{+} ) P$

[*Explanation:* The symbol,  $\xleftarrow{\quad}$  indicates a relation without prejudgment of its jural character, if any it has. The symbols demonstrate that relation No. 1 is a mesonomic relation as shown in the conclusion of No. 4. The power of ratification evolved in No. 3 superadded to the original contract relation (No. 1) results in the creation of a zygnomic relation. The relation thus converted is No. 1 and not No. 2. This is juristic proof that the original relation had some jural character. Since that character was a no-constraint character it follows that it must be a mesonomic relation.]

17. **Summary.**—We may now sum up the whole matter of the creative jural character of acts in the following diagram:

TABLE NO. II

ACTS<sup>52</sup>

		Resulting Relation
UNLAWFUL	$\left\{ \begin{array}{l} \text{Void} \dots\dots\dots \end{array} \right.$	Anomic
	$\left\{ \begin{array}{l} \text{Sanctional} \dots\dots\dots \end{array} \right.$	Zygnomic
LAWFUL	$\left\{ \begin{array}{l} \text{Constraining} \dots\dots\dots \end{array} \right.$	Zygnomic
	$\left\{ \begin{array}{l} \text{Non-Constraining} \dots\dots\dots \end{array} \right.$	Mesonomic
	$\left\{ \begin{array}{l} \text{Unconstraining} \dots\dots\dots \end{array} \right.$	$\left\{ \begin{array}{l} \text{Voidable} \\ \text{Ineffective} \end{array} \right\}$ Mesonomic

<sup>52</sup> In this classification, we have avoided use of the conventional terms 'valid' and 'invalid' because their meaning is not clear and because confusion might, therefore, result. If, for example, an offer of contract is made, is the act 'valid' or not, and by what test? If lawful physical

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coercion is implied, the act is not 'valid' since the offeree is not physically constrained. If the term 'valid' means that the servus of the relation from which the act springs must suffer the legal effect of the making of an offer, then a tort act also is 'valid' since the servus must against his will suffer the legal consequences of the tort act (i. e., he gets a cause of action for the tort). If, on the other hand, 'valid' means want of defensibility, the term becomes more incoherent since there is nothing to defend against the making of an offer.



## CHAPTER XVII

### PERSONATENESS

- |                                     |                                 |
|-------------------------------------|---------------------------------|
| 1. Is a human being a legal person? | 8. Suicide.                     |
| 2. Personateness and personality.   | 9. Rights of unborn persons.    |
| 3. Slavery.                         | 10. Pre-natal harms.            |
| 4. Corporation sole.                | 11. Hereditas jacens.           |
| 5. Agency.                          | 12. Contracts made after death. |
| 6. Civil death.                     | 13. Post-mortem torts.          |
| 7. Actions for death.               | 14. Plural personateness.       |
|                                     | 15. Conclusion.                 |

1. **Is a human being a legal person?**—The problem to be discussed is this: Is a human being a legal person (*persona*) or is such a being merely an object? In other words, the question is: Is a human being a subject of legal relations or an object of legal relations? The conventional answer to this question given by European codes and by jurists is that a human being, unless a slave, is a legal person and that a human being is never an object, even in the sphere of family law.

If the conventional view were correct, there would be nothing more to be said, but it is believed that this view is erroneous, that it is not applied in actual practice, and that the proof to the contrary is overwhelming.

An effort will be made to adduce these proofs chiefly from Anglo-American law. The importance of this inquiry bears chiefly on the question of legal relations that exist or may exist antedating or postdating the life of a human being. Secondly, this inquiry will be found to have a bearing on the much discussed problem of the nature of so-called artificial persons (moral persons, juristic persons.)

2. **Personateness and personality.**—As a preliminary, we must distinguish sharply two ideas—the idea of legal person (*'persona'*) and the idea of legal personality. A legal person is

a concept to which is attributed a capacity for being in legal relation.

Legal personality is the sum total of the legal relations of a person. A person, therefore, in the law is a mere ideal or conceptual point of reference, or as Kelsen puts it, "nur ein idealer Zurechnungspunkt." The person (*persona*) is an irreducible juristic subsistent. It comes into existence and goes out of existence. During existence it has only one quality—the capacity of attracting legal relations whether as *dominus* or *servus* of such relations. The person may control claims or immunities and powers or privileges or may be ligated to duties or disabilities and liabilities or inabilities. In a word, a person has a capacity for rights and ligations. The legal relations which the person attracts are the person's personality.

While the idea of person is irreducible and ultimate, the idea of personality is subject to expansion or contraction. Theoretically, it may seem, that there might be a person without personality, i. e., without any rights or ligations; but it is clear that the converse can not be true; there can not be personality without a person. A hypothetical instance of the theoretical possibility may be put as follows: If a corporation is created (as would, of course, be at least possible) before a subscription to shares and before the corporation has acquired a corporate name or any assets or liabilities, there would be a legal person without personality. At any rate, in the case put, if any legal relations can be discovered, they would be of a purely contingent nature. Whether *persona* and personality accurately are interdependent, whether in a word they are different functions of one idea, is a problem which may here be put aside, since it is evident that the terms 'persona' and 'personality' and the related qualifying terms, 'capacity' and 'capability,' serve a useful purpose in the same way as do the comparable terms, matter and quality.

We now proceed to bring forward the proofs of our thesis.

3. **Slavery.**—(1). We shall begin with slavery. The Roman law of slavery is not especially helpful, since the Roman slave had a dual legal character; he was both object and person. He could be owned and sold; but he could also perform 'juristic'



acts. Where the English law of slavery prevailed, a slave was merely an object and could not perform a juristic act any more than could a trained animal. Without going into the detail of the matter, if it may be assumed that a slave can not enter into any legal relations whatsoever, then if and when the slave is emancipated and becomes a legal person, something has been added which does not have an objective character. The former slave is the same human being but the quality added is purely conceptual, and it is that quality which is the essence of personateness. The difficulty remains that the quality added, the personateness, attaches to a human being, and if it does not suffice to say that this addition demonstrates the conceptual character of personateness, then we must seek an instance where the concept of personateness is detached from a human being.

4. **Corporation sole.**—(2). Such an instance is found in the case of the English corporation sole where the concept of personateness attaches to a succession of human beings. Where the incumbent of the office dies, the corporation does not cease to exist although there is no present substrate. This instance would appear to be conclusive and the only argument that can bear against it is that it deals with a limited species of personateness unlike the personateness of a human being. We shall, however, attempt to show that the distinction is one of no importance and that the personateness of a human being does not differ juristically from the personateness of an ‘*universitas bonorum*,’ of an ‘*universitas personarum*,’ or any of the other varieties recognized by systems of law. There is only one idea of personateness, but it has many different manifestations to secure the practical needs of society.

5. **Agency.**—(3). Where a power of agency is consummated in a juristic act with a third person in ignorance of the death of the principal, it has been held in some jurisdictions that the juristic act binds the estate of the late principal. Since act and person must coincide, it is clear that the act, in the case put, must be connected with a ‘person’ not identical with the human being now dead. As the contrary cases put it, there can

be no act of agency without a principal in being. It results, therefore, where an act of agency is held valid after the physical death of the principal, that the principal for the purposes of law is a pure concept. It also follows, we believe, that there is not one kind of person where the principal (in the sense of a human being) lives and another kind of person where the principal (in the same physical sense) is dead. In other words, there is no need of any such departure and it is a juristic inelegance to assume it. The person is the same whether the physical substrate is alive or dead. Where we identify the legal person (and we use the term always in a conceptual sense) with a physical human body it is merely an elliptical use of language analogous to the expression 'conveyance' of land or 'sale' of a chattel. What is meant by such expressions is that certain legal relations in one person have been destroyed and that new legal relations of a similar (though not identical) kind have been created in another.

Where the principal is ligated in a juristic act of agency after the death of his physical body, it is not uncommon to encounter explanations which seek to avoid the conclusion at which we arrive, by saying that it is simply an exceptional rule of law to accomplish justice; that, in fact, there was no principal, but that it is just to hold his estate responsible for putting in motion a jural force which has affected another after his death. That explanation is, of course, a possible one, but it involves three difficulties: (1) It destroys the symmetry of our concepts for the sake of accounting for a particular case; (2) it obligates an estate for a claim that could not be guarded against except by refraining entirely from all such agency transactions; and (3) it leaves all the other cases unaccounted for unless by injecting similar exceptions to a general rule.

6. **Civil Death.**—(4). The converse of emancipation is civil death (*mors civilis*). This institution was recognized in early English law and to some extent also in the Roman system of law. For example, a person entering into religion could make a will appointing executors and if he made none, his estate would be administered as in intestacy. In emancipation, the

conceptual persona comes into being by the act of emancipation. It has for its substrate a human being, the former slave, but the physical personateness of the man has not been altered. He is the same human being; the added element is purely conceptual; and that added element is legal personateness. In civil death, also, the physical personateness remains the same as before, but a legal attribute has been detached. The thing taken away is the conceptual attribution of legal personateness.

The proposition sought to be demonstrated may be illustrated by an equation:

$$\begin{aligned} \text{Homo} + \text{attribute} &= \text{persona} \\ \text{Homo} &= \text{persona} - \text{attribute} \end{aligned}$$

It is perfectly clear, and the slavery case demonstrates it, that the following equation is incorrect:

$$\text{Homo} = \text{persona}$$

Therefore, it follows that the physical element while normally associated with the conceptual element is logically accidental and is no part of the essence of legal personateness.

In the case of civil death, it needs to be said that it is not entirely clear that there is a complete extinction of legal personateness. There are three possibilities: (a) That all of the old proprietary capacities and capabilities are brought to an end as in the case of physical death, but that the persona with its personal capacities endures; (b) that the old proprietary capabilities are brought to an end but that the persona with new proprietary capacities and continuing personal capacities endures; (c) that all capacities and capabilities of every kind are brought to an end. If the last of these results is accomplished, then two alternatives present themselves: (a) The human being stripped of his legal personateness remains only a human being and is therefore merely an object; or (b) he immediately succeeds to a new persona with such limitations on his capacity for legal relations as the law sees fit to impose. Which of these various possibilities is the one to be historically accepted is beyond the scope of this discussion.

7. **Actions for death.**—(5). In a few American states, a new cause of action not recognized under the English common law, has been created for causing death, where the recovery is an asset of the estate and is not for the special benefit of the next of kin. These instances furnish irrefutable logical proof of our thesis. The action is allowed not for the harm to personal integrity consummated in the lifetime of the person killed, nor is it for the loss of services or support of relatives or dependants. It is, it must clearly be noted, an action for a harm done to the person deceased which harm is the death itself. The wrongful act is the death. At the moment when the act is complete, there was not in being a living physical person; but since, however, a wrong was committed, that wrong could only be one done to some legal person. That legal person was not any other living person and it accordingly follows that the legal persona in these cases must and does survive the death of the physical body.

This instance is one which can not be explained as an exception. The rule itself, admittedly, is exceptional, but the juristic explanation can not be rationalized on the basis of an exception. The rule, perhaps, can not be justified, but it would seem to be as supportable as the rule, by no means exceptional, which allows recovery by personal representative for personal injuries. At any rate, it is impossible in finding a juristic explanation to fall back on the slovenly resort to a kind of formless equity which operates without concepts and looks to results in isolated cases regardless of how those results are attained.

8. **Suicide.**—(6). In the English common law, suicide was said to be a crime and was followed by indignities to the suicide's dead body and by forfeiture of goods. Much has been written on the effectiveness of criminal sanctions dealing with suicide and with attempts at suicide. The wisdom of such legislation has been doubted but we are not concerned with the legislative problem. What interests us here is that there can be no punishment without a person to punish. Indignities to a dead body are not punishment of a dead body. Forfeiture of goods is not punishment of the goods. It would seem to follow that the punish-

ment, if it has any rational juristic basis at all, must be punishment inflicted on a legal person. Since there is no living human being in existence when the punishment falls, we must here as elsewhere hypostatize a conceptual persona which survives the death of the physical body. It is the conceptual persona that is threatened with criminal sanctions and not the living person. The act of suicide is caused by the physical person, but the act of death (considered as a result) is not the act of the physical person since when it becomes an act, when death occurs, there is no longer any living physical person. A physical person, therefore, can not commit suicide. And, of course, a conceptual persona can not commit suicide either. Is there any escape from this difficulty? We believe there is, but, in stating it, we must disclaim any responsibility for the wisdom of the law which makes a rational explanation of so difficult a question necessary. The juristic explanation which accords with the views already expressed is that there was an act (more strictly an event)—the death—as a result of a human reflex. When that act was consummated there was no longer in existence any living human being with which to connect it. (We assume here that an act without at least a legal person is juristically inconceivable.) There is, however, if not a living person, a conceptual person in existence which survived until the criminal sanction could be carried out.

A similar problem, and one of more practical importance in the modern world, is how accessories to suicide can be held accountable upon any sound juristic ground. The technical difficulty arises from a rule of English law that an accessory before the fact is not triable unless the principal also is triable. Since it has been supposed that the 'principal' is a human being now dead by suicide, the accessory can not be convicted. It may be suggested that whatever the sound policy which supports the rule in general, it should give way in a case where the persona of the principal is extinguished; but the question still remains whether in legal fact it has been extinguished.

9. **Rights of unborn persons.**—(7). Property interests may be created in unborn persons. A child '*in ventre sa mère*' may



presently have an interest limited to him. In various other ways, estates may be limited to unborn persons by means of 'contingent' remainders, by 'executory devises,' and by 'springing uses.' The fact that such estates are merely expectant, and that they are contingent, does not alter the juristic situation. When we say that such contingent estates may be and are presently created, we are also saying that rights and legal relations are presently created. Since in all these cases there is no present human being in existence to be identified with these legal relations, we are compelled either to say that legal relations may exist without *domini* or that the *domini* are conceptual *personæ*. The first alternative is an inconceivable one since a legal relation without subjects can not be imagined. The second alternative is inescapable. The question remains, whether when such contingent estates becomes vested by the event of birth, the conceptual *personæ* identified with the contingent estates are replaced by physical persons identified with the vested estates. That hypothesis is a possible one but it is unnecessary and inelegant. It produces unnecessary complexity for no end except to satisfy the demands of an ancient misconception of the nature of legal personateness. The true solution, we believe, is to regard the subject of these legal relations as being the same at all times throughout the juristic changes that overtake them.

10. **Pre-natal harms.**—(8). It has been held (although the current of authority in America is the other way) that a child in embryo may after birth recover damages for a harm sustained before birth through the negligence of another. It is clear, where such an action is allowed, that there is legal personateness anterior to birth. The cases which hold that there can not be a recovery for pre-natal harms go upon the ground either that there is no legal person in existence at the time of the harm or upon the ground of remoteness. The first ground is without merit since the legal person is never a developing or a developed human being but simply a legal concept created by law for the purpose of doing justice. It is not a thing existing for itself but is a tool of the law created and used for the better adjustment of the practical relations of society. The test is one of

policy and it is not solved by an arbitrary limitation of person-ateness. That an embryo is not a human being is clear enough, but whether it should be regarded, for harms which it sustains, as a legal person can not be answered by legal dogma. Where a child is born and survives with the deformities of a pre-natal harm, there is at least nothing in juristic logic that will prevent a just result. Whether an action should be allowed for such harms in the present state of the law which is bottomed on the idea of no liability without fault is another question. Whether an action should be allowed, where the child which has sustained a pre-natal injury, is prematurely born or is born and does not survive, presents for solution again another different problem of policy.

11. *Hereditas jacens*.—(9). On the question under consideration the *hereditas jacens* is worthy of notice. As is well known, a *hereditas iacens* consisted of rights (claims and powers) and ligations (duties and liabilities). It could acquire new rights by the separation of fruits, by juristic acts of slaves, by wrongs committed against the estate, and in various other ways. It could acquire new ligations by wrongs against the persons or property of others, by '*negotiorum gestio*,' and otherwise. The great question is who is the subject of these rights and ligations before entry of the '*heres voluntarius*.' There are three possible theories: (1) That the '*hereditas*' is itself a *persona* in the same way that a foundation may be a *persona*; (2) that the unknown heir is the subject of the estate; and (3) that the *persona* of the '*defunctus*' survives until the heir enters.

Since it is clearly necessary to posit a present *persona* in all instances of existing legal relations, it would seem that either one of the above theories would be workable; but since these theories can not be equally meritorious in juristic logic, it is necessary to choose the one which agrees at the greatest number of points with the ideal symmetry of the law.

The theory of foundation from that point of view is objectionable in that, normally, a *persona* has for its substrate a human being and in that an additional *persona* is created. It is, therefore, anomalous and complex.

The theory that the unknown heir is a persona—a view apparently supported by Pomponius (D. 46. 2. 24)—is objectionable on the ground of the present uncertainty of the subject of the legal relations.

The view that the persona of the 'defunctus' survives, which to some extent finds the support of Ulpian (D. 41. 1. 34) is the one that commends itself to us as the theory which involves the simplest juristic operation. It is the theory also which most harmoniously adjusts itself to the other situations of personateness where there is a dislocation of physical personateness.

The same problem is found in Anglo-American law, but it has received little theoretical discussion. As to the goods of an estate before the appointment of an administrator, it seems to be the English view that the title passes to the bishop of the diocese or to the judge of probate. This solution proceeds upon the realistic view that legal persona and physical personateness are the same, and we venture to believe that the correct solution for all cases where there is a period of dislocation following the death of an owner and the entry of a representative, is to posit the survival of the 'defunctus.'

Another question is here involved—whether the representative upon his entry shall be considered as bearing the persona of the defunctus or as possessing a new persona. The classical view of universal succession probably can not be demonstrated. The person of the defunctus did not survive and in some mysterious manner combine itself with the persona of the heir, but, on the contrary, it ended with the entry of the heir and thereupon the heir represented through himself alone, a new persona to which became attached an entirely new set of legal relations, not identical with, but for many purposes, similar, to the unadjusted and unextinguished legal relations of the defunctus. In a word, there is no juristic difference of essence between universal succession and singular succession; the differences are only in the scope of the new rights and ligations created by such successions, **respectively.**

**12. Contracts made after death.—(10).** The German Civil Code provides that the effectiveness of a declaration of intention

is not affected by the death of the declarant [section 130 (2)] and that the conclusion of a contract is not prevented by the death of the offerer (section 153). The English rule seems to be the other way. Where the first rule prevails (and it would appear to be the better one) it is not necessary to belabor the point, that if a legal relation is created after the death of one of the parties, it is necessary to posit a conceptual persona, since, without a persona, there can be no legal relation. It may, however, be remarked that it is unnecessary to say that if the offerer lives, the contract is between two human beings, while if the offerer is dead at the moment of acceptance, the contract is between a conceptual persona on one side and a human being on the other. The operation is anomalous and juristically inartistic.

**13. Post-mortem torts.**—(11). Like the problem of the post-mortem contract, is the post-mortem tort. A man in his lifetime may put in motion a force that takes effect after his death. If an act is defined as the result of the contraction of the muscles of a human being (or as the result attributable to the absence of such a contraction of muscular tissue), then there is no harmful result, and likewise there is no act until after the event of death. Suppose that *A* carelessly lights a fire on his own land, which after *A*'s death, spreads to the land of *B*, destroying *B*'s buildings. Until the fire reached the land of *B*, there was no legally harmful act; there was no 'iniuria'; and when the fire reached *B*'s land and destroyed *B*'s buildings, the human being, *A*, was no longer in existence.

Can we say that the act, i. e., the harmful result, was the act of the human being called *A*? No. There can be no act without an actor. An act without an actor is not conceivable. If it be answered that a result can be attributed to a physical person no longer in existence, the answer is both correct and irrelevant. All that the statement can mean is that a certain physical person, now dead, caused a result which eventuated after his death. But liability is imposed, primarily, not for what is caused but for what is done. The causal facts were not in themselves harmful apart from the harmful results. The estate of the physical person

can not be accountable for the causal facts since they were neither harmful nor actionable. The result can not be connected with the physical person who is now dead. We are here in an alley blind at both ends.

Can the act be held to be the act of the heirs or personal representatives? The negative answer is too clear to need discussion. The harmful result must in some way be legally connected with the author of the harm or else we must say that in these exceptional cases there is '*damnum sine iniuria*.'

If we adopt the same technical explanation used in the preceding instances, the difficulty vanishes. That explanation is that the persona of the actor survives the death of the actor at least long enough to circumscribe all the necessary legal effects of the actings chargeable to that persona. But, in the case put, the harmful result is not strictly an act at all, since the actor (i. e., the physical person) is no longer in existence; it is, however, an event the legal effects of which may be technically attributed and which sound justice requires to be attributed, to the legal person. Any attempt to fasten this liability on the estate of the legal person as an act of the physical person of course reaches the same practical result, but it reaches it in a manner inadmissible for legal science, since it is wanting in rational and coherent explanation. An attempt to fasten the liability of such a case on the heirs is a primitive solution lacking the instinct of modern ideas of justice; and where the liability of the heirs is limited to the extent of the estate received from the ancestor, it accomplishes only a rustic justice.

**14. Plural personateness.**—(12). The situation where '*unus homo plures personas sustinet*' presents what would seem to be a convincing illustration of the conceptual nature of personateness. If *E* is an executor of an estate, there are two personæ—the persona of *E* and the persona of *E*, executor. Both are connected with the same physical human substrate. If *E*, the human being, is identical with *E*, the legal person, then *E*, the human being can not be identical with the legal person of *E* the executor. One or the other must be conceptual, since it is not permissible to divide the physical human being into two or more legal parts



where one part is one legal person and another part is another legal person. Furthermore, if one legal person necessarily is conceptual, the other legal person also is conceptual since no differences can be detected requiring us to believe that one person is more physical than the other. The fact that one legal person came into existence with the birth of a human being and that the other came into being after the birth of the same human being, is not such a difference as would account for such a strange duality in the nature of the two legal persons. It does, however, readily account for the error of the prevailing view. Where two events normally coincide (in this instance, birth and legal personateness) it is easy and natural to identify the person born with the legal concept of personateness and to say that the physical person and the legal person are the same.

**15. Conclusion.**—Physical personateness is a social fact, and legal personateness is a legal fact. The social fact can not be altered by the law, and that social fact is a necessary datum for legal phenomena. Legal phenomena in the last result are intended to be realized as social facts, but these results in the world of experience are provided for, prepared, and organized by a conceptual process which is *sui generis*. This process involves a conceptual recognition of legal relations and of jural acts wherein the conceptual nature of legal personateness is a necessary postulate for any system of law which has reached a scientific level.

A few other instances (such as administration of the estates of absent persons later discovered to be living, the merger of the persona of a feme sole in that of her husband in English law, the partnership entity, and the operation of *ius postliminii* in Roman law), suggest themselves. They do not add anything but further corroboration of the main thesis—that the subjects of legal relations are never, in modern law, physical human beings but are conceptual personæ which while normally having for their substrates physical human beings, are not to be identified with them. Legal personateness may antedate or may postdate physical personateness, and where physical personateness exists, legal personateness is a distinct legal entity.

All this leads to the necessary conclusion that physical human

beings are only objects in the law. Harms to the human body are redressed in many cases by the same kind of remedies as harms to inanimate objects. For example, the slander of the physical person is not different in nature or remedy from the slander of goods. Where differences exist they arise simply out of differences in the nature of the thing and not from an inherent dissimilarity in legal essence.

If individual personateness is conceptual, it follows that the personateness of an aggregate of human beings must also be conceptual. If the legal fact of the conceptual nature of the individual had been clearly recognized, the strangely cumbersome and inelegant theory that a corporation aggregate is a 'real' person ('gesamt Person') with an actual will ('gesamt Wille') would hardly have survived to become a topic of perpetual and time-worn juristic discussion.

## CHAPTER XVIII

### THINGS

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|---|---|
| 1. Definition.                                  | 8. Ownership as a juristic hypothesis.      |
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1. **Definition.**—In the widest sense, a ‘thing’ is that which has a predicate; it is any subject of discourse. To illustrate this meaning, the following are things: material substances, forces, subjective impressions (sensations, perceptions), and also logical concepts. This meaning also would include purely imaginative and emotional states, imaginative concepts, and other subjects of no juristic importance. We have seen in an analysis of jural relations into their elements that a jural relation is constituted of persons, and an act to which may be added a third element, law, which gives a relation its specific jural character. Persons, acts, and law are also subjects of discourse, and would in this extensive meaning be things, but it would be desirable to limit the meaning of the term in such a way as to exclude the ideas of person, act, and law.

Holland considers things as elements of rights and has defined a thing as “the object of a right; i. e. whatever is treated by the law as the object over which one person exercises a right and with reference to which another person lies under a duty.” It seems to be an inaccuracy to include things as *elements* of rights, since they are outlying purposes of rights. That point, however, is not important here, nor is it important that Holland has considered rights in the too exclusive sense of jural relations involv-

ing only duties, disregarding power relations which also have an object. We believe the suggested definition in tendency is a fruitful one for jurisprudence, but it needs clarification. It is not entirely clear what is meant by an "object over which one person exercises a right." A right in the sense of a claim (correlate of duty) can not be exercised. The dominus of a claim relation simply has it (more accurately is a part of the relation) and only the servus can have an active part concerning it. The dominus of a claim can not exercise the claim; but this point also may be waived. What, then, is the meaning of the "*object over which*" a person has a right?

The difficulty may best be shown by considering an illustration. The interest of corporal integrity of human beings is protected by negative claim-duty relations which constrain other persons from invading the interest of corporal integrity. Is the *object* of the right, the interest of corporal integrity (i. e. a factual relation of corporal security); or is it the human body which is the focus of the interest; or is it finally the factual relation which arises from performance of negative duties? These are three entirely separable ideas each one of which might answer the description of object or thing. Another illustration may be useful. *A* owes *B* a sum of money; therefore, *A* owes a positive duty to tender performance of what he owes. Is the object of the right *B*'s subjective interest to be paid (i. e. anticipation of a future factual relation); or, is it money (it can not be specific money); or, finally, is it the factual relation which arises when *B* tenders performance. Here, again, are three separable ideas each of which might answer the description of 'object' or 'thing.' While a doubt has been interposed here, it is proper to say that the context of Holland's discussion of the matter makes it clear that he considers as things such objects as house, tree, field, horse, slave, patent, trade-mark and easement.

This enumeration, however, only presents further difficulties. For example, an easement is a certain kind of right. If we say that the *thing* called an easement is the object of the *right* called easement, we fall into confusion. Again, a trade-mark may be understood either as the mark or as the legal relation arising out of its first appropriation.

*Other definitions.* Another definition of thing (Sache) is that it is "any unity with economic value." This definition is broad enough to include jural relations and also those substances and relations of the physical world concerning which jural relations are created. A striking illustration of this double meaning is the familiar category of 'res corporalis' (land, chattels) and 'res incorporalis' (servitudes, choses in action).

The most restricted definition of thing is that of the German Civil Code according to which "things, in the sense of the law, are material objects only."

2. **Infra-jural relations.**—Excluding the elements of persons, acts, and law from any definition of 'thing,' we may appropriate the term for the outlying object of jural relations. This object or end of a jural relation must not be confused with the interest for the legal recognition of which jural relations are created, nor should these interests be denominated 'things.' The interest may be more extensive than the legal recognition of it and in no case is the object of a jural relation precisely the same as the interest. We are not concerned here with the difficult problem of the nature of interests. For purposes of law, interests are purely extra-jural hypotheses.

The object for which jural relations exist is a relational thing. The protection of corporal integrity is a matter of relation. And, here, again, we must not confuse the artificial *jural* relation with the *factual* relation which the jural relation protects. The jural relation is a relation atomically of one person to another person. But the factual relation of, for example, unimpaired corporal integrity of the human body is a physical relation in its substrate, of matter to matter. The object of the jural relation is to put the dominus of the jural relation into a purely physical relation to a certain arrangement of matter. This process of superimposing one relation upon another seems, no doubt, somewhat complex, but the process is no more complex than the facts to which it relates.

To summarize the points made (and keeping to the simple illustration of corporal integrity), there is a triple series of relations: (a) The physical mater-to-matter relation (i. e. corporal integ-



rity); (b) the physical relation of non-interference with the physical substrate; (c) the jural relation which protects the relation of non-interference. It is the second of these ascending relations to which we would apply the term 'thing' in a juristic sense.

In passing, it may be observed that the law indirectly deals with other types of relation than those which we have defined as jural relations. The object of any jural relation (the thing for which it exists) is itself a kind of legal relation. There is no recognized term to designate it and for convenience in this discussion we may term it an *infra-jural* relation. The fact of possession is an important illustration of *infra-jural* relation. It is characteristic of *infra-jural* relations that they include relations of human beings to other human beings and to material substance. A jural relation, on the other hand, is always a relation of one conceptual persona to another persona.

An *infra-jural* relation, therefore, is any relation not itself a jural relation (a) which is protected by a jural relation (e. g. possession, corporal integrity, good will) or (b) which arises upon the evolution of a jural relation. The term 'thing' as the object of a jural relation may be appropriated for the second of these meanings and to avoid confusion with use of the term 'thing' in the broad sense, it may be specifically designated '*jural thing*.' Jural thing, therefore, will always have a single meaning to point out the factual result of the evolution of a legal relation. Thus, if *A* owes *B* a debt, the duty is to tender what is owed. This duty is performable only by means of a duty-power which upon being evolved, presents a factual situation where the creditor is able to accept what is tendered. That factual situation is the '*jural thing*' of the claim-duty relation.

Since only power relations can be evolved, and since power relations consist not only of duty-powers, but also of non-duty powers (e. g., powers of appointment, of agency, forfeiture, recaption) and contra-duty powers (e. g. breach of contract duty, breach of tort duty), the question arises whether the term '*jural thing*' is limited to the evolution of duty-powers or if it may be extended also to non-duty powers and contra-duty powers. The question probably is not important, but it seems clear that the

term by preference would apply to duty-powers. Next in normal application it would be applied to non-duty powers. It is probably wholly inapplicable to contra-duty powers.

At this point, it may be observed as a matter of juristic interest, that, at certain points, jural things and acts, as heretofore defined, seem to coincide in meaning. What has been defined as a legal act (i. e. a factual result attributable to a human reflex) is not distinguishable from a jural thing. In duty-powers and non-duty powers the coincidence is complete, and since the term jural thing is not applicable to contra-duty powers, the term 'legal act' has a wider extension than 'jural thing.' But without attempting to distinguish the terms on that point, the coincidence of legal act and jural thing is a juristic convenience which permits the same factual situation to be treated under two distinct functions (i. e. the function of causation [act] and the function of purpose [thing]) without a multiplication of the conceptual elements of jural phenomena. A factual situation produced by the evolution of a jural relation may, therefore, according to the function to be emphasized be either a 'legal act' or a 'jural thing.'

In summary: not all infra-jural relations are jural things but the factual results of the evolution of duty-power and non-duty power relations are jural things. Act is a broader term than jural thing but in the evolution of duty-powers and in non-duty powers they coincide with different juristic functions. *A thing is any subject of discourse. A jural thing is a future protected infra-jural relation.*

**3. Thing elements.**—Since jural things are infra-jural relations, it follows that they are complex. The object here is to state the infra-jural elements which enter into these complexes. These elements are of two logical orders: (a) Ultimate elements and (b) intermediate elements. Both of these orders of elements may be called 'thing elements,' a term which combines the idea of jural thing with the elements of which they are composed.

(A) *Ultimate thing elements.* The ultimate elements into which jural things may be decomposed are the following:

(1) *Space.* Space may be possessed and intrusions on space

may result in actions on the case, trespass, ejectment, and mandatory injunction. Divisions of terrestrial space are what is known as land.

Space also is a point of reference to such rights as easements, rights to the use of highways, and the personal right of free locomotion. These rights are not strictly in the space itself but in freedom to move material substances through space. These rights do not seem to be infringed by interference with freedom of movement in space except where economic harm follows the interference. Thus, the right of free locomotion is not violated by cutting off parts of the accessible space short of deprivation of access to all space unless economic harm is shown. Deprivation of all access to surrounding space to the human body is imprisonment and is actionable without economic harm. Whether a similar exclusion of access to surrounding space to the movement of material substances other than the human body would be actionable in the absence of economic loss, is not clear, assuming, of course, that the acts of exclusion are not deprivations of possession.

(2) *Motion*. The forces of nature may be treated as subjects of property. Electric light, heat, and power are commercially dealt with. Heat, also, is distributed by circulation of hot water and steam on a commercial basis. These forces often are spoken of as subjects of sale transactions but that usage is clearly incorrect since motion can not be possessed. As against this it may be supposed that when a discharged storage battery is recharged, there is a sale of the force since the value commercially of an uncharged battery is less than that of a charged battery. If the case put is one of sale of a charged battery the sale in the true sense is of a material substance which can be possessed, having a molecular arrangement of such a nature as to be capable of producing kinetic energy. The energy is capable of control but it can not be possessed.

The term motion has a wide legal application beyond the forces of nature (e. g. easement of light) and includes apparently all unpolarized duties. One illustration will suffice. When we speak of the right of reputation, we find on analysis of what precisely

is meant, that reputation is an infra-jural relation of a given human being to the behavior of other human beings in the same community. This relation is not a subjective one as is commonly supposed but is constituted of the external acts (verbal acts, muscular acts) of surrounding human beings. These acts no doubt are always founded on subjective feeling but the essence of the matter goes no farther than external behavior. This behavior is a complex of social motions, and a harmful interference with these motions is actionable. The right of reputation differs from the right of corporal integrity in the method of possible violation. Reputation is infringed by interfering with motions already in process toward a given human being. Trespass is accomplished by initiating harmful motions against the same human being. Defamation is a harmful change of current in social motions; corporal trespass is the creation of a new motion harmful in its results.

Motion also is involved in polarized legal relations as when *A* owes *B* a performance of a positive act, but in these cases, the significant element of the act is not the motion itself but the result of the motion (e. g. tender of money, performance of a service). Expressed juristically, in unpolarized legal relations *acting* is the significant element; in polarized legal relations the *act* is the significant element. This results from the fact that in unpolarized relations an undisturbed condition of a *res* (e. g. land space, corporal integrity, possession, mental security, immunity from fraud, unimpaired pecuniary condition) is the infra-jural relation to be protected against interference, while in positive polarized relations a change is to be effected in a given infra-jural relation.

(3) *Matter*. Matter is known to us in the forms of gas, fluid, and solid. Matter is of three kinds: (a) Naturally formless matter (e. g. water, gas); (b) naturally formed matter (e. g. grain, vegetables, fruits, animals); (c) artificially formed matter (e. g. goods, wares, and merchandise). The last group probably by professional preference attracts use of the term 'object.'

The human body also must be classified as matter. The human body never is a jural subject (i. e. carrier of rights or ligations).

The subject of jural relations always is a conceptual person (persona). As matter, however, the human body is the only species that can act although other species of matter may be the immediate substrate of the conceptual person. In the right of corporal integrity the carrier of the claim is the conceptual person and the thing element is the human body. The fact that the law does not permit the jural subject to deal with the thing element as an ordinary chattel is irrelevant and simply points out one of the differentiae in this species of thing element in the same way that money as a thing element is differently treated in the law from other thing elements. Where slavery prevailed, the human body was treated in much the same way as cattle or other domestic animals. In a few American states, the legal formality for conveying a slave was the same as that for conveying land, but such differences do not affect the jural essentials and the human body in the absence of slave law still remains a mere thing element.

The living human body is put in a class distinct from the class of other animals because it is the *ultimate* substrate of all jural relations. Sometimes, aggregates of material thing elements and also jural relations may be jurally personified, but such types of personateness are not ultimate. They are surrounded by other personæ whose substrate is a human being, however many the intermediate steps. For example, an aggregate of jural relations consisting of rights and ligations might be personified as *A*; the rights might be held by a corporation *B* and the ligations by another corporation, *C*. The complexity might be increased by assuming other corporations and foundations which own all of the capital stock of *B* and *C*, respectively; but yet in the last resort, jural relations would be found which center in a jural person whose substrate is a single human body.

Dead bodies also are thing elements for certain purposes and necessarily so since disputes may and do arise over their possession. Unidentified skeletons and ancient mummified bodies probably are subjects not only of possession but also of ownership.

All jural things are reducible ultimately to space, motion, or matter, or to a combination of them. Likewise, these ultimate thing elements are the irreducible points of reference of all jural relations.



(B) *Intermediate thing elements*. These are complexes of matter or motion combined with form or idea. Ideas are never thing elements but they serve the purpose of changing ultimate elements into higher forms in the same way, for example, that oxygen and hydrogen are combined in a new form of water.

(1) *Ideal things*. There does not seem to be any legal protection afforded to pure ideas not in some manner embodied in a form of matter or motion, and ideas even as so embodied are subject to appropriation by rediscovery.

An author before publication has a legally protected interest in the verbal form of his manuscript against imitation and multiplication of the form. This protection goes even to the protection of the verbal form when uttered at a lecture. Similar protection is extended to the stage rights of a drama publicly acted and to a picture hung at an exhibition, apart from registered copyright. The law, however, has stopped short of ideas not embodied in a definite form of words, sounds, symbols, pictorial form, or design. Trade secrets embodied in a machine, process, or method are protected only against force, fraud, and breach of contract. A plan or scheme independent of any particular form does not seem to be within the orbit of legal protection. The protection in these cases, then, is not of ideas as such but of ideas embodied in a form of matter (writing or printing) or motion (sounds, acting).

Registered inventions, designs, marks, and names stand in a different category. The fact of registration shuts out the possibility of lawful appropriation by rediscovery. But in all of these cases while the idea is the ultimate thing in a factual consideration, it is not a relevant fact in a strict legal consideration of the matter. The thing element is not an idea but a form of matter or of motion which has the quality of being able to express an idea. Ideas without embodiment can not be known in the judicial process, and form can not exist without the vehicle of matter or of motion. No doubt the idea is factually protected as such but we can only infer the fact from the protection of the material form which is the ultimate thing element for legal purposes.

A trust res as between trustee and cestui, money for purposes

of tender, and other fungible goods are ideal things. These are intermediate thing elements and they are reducible in the last resort to specific material substances. If *A* sells to *B* one hundred bushels of wheat in *A*'s warehouse containing one thousand bushels of wheat, *B* does not (as between *A* and *B*) before appropriation become owner of any wheat. His title is to an ideal thing. Through the intermediation of that ideal thing, *B* may become the owner of material grain. As a co-tenant he may require or make partition of his aliquot share of the mass. The ideality of this form of ownership is especially evident in cases where grain deposited in a warehouse is constantly shifting so that, from time to time, the entire mass is replaced by new deposits of grain.

(2) *Jural relations.* Jural relations themselves are often points of reference to other jural relations. Many *jura ad rem* (rights to have other rights) present this situation of cross reference. Not all *jura ad rem*, however, operate in this way. If *A*, the owner, has agreed with *B* to convey Blackacre, *A*'s present rights in Blackacre are not directly the points of reference to *B*'s claim against *A* to become owner. *B* is only concerned to become owner and he can not acquire the rights of ownership of *A*. *B* can require simply an abandonment of *A*'s ownership and possession in such a manner that *B* may acquire a new ownership and possession at the point of abandonment. The ownership of *A*, therefore, in this instance is not a point of reference to *B*'s claim against *A*.

But if *A* having a claim to a money performance by *C* agrees to 'assign' his (*A*'s) claim to *B*, we have an instance of a complex *jus ad rem* where one jural relation is a point of reference to another jural relation. The complete formula for this case is: polarized claim to have a polarized claim to have an unpolarized claim or in terms usually employed, *jus in personam ad jus in personam ad jus in rem*. That is to say, *B* has a claim against *A* which when satisfied will give *B* a claim against *C* which when satisfied will give *B* a claim to undisturbed possession of money substance as against indeterminate persons. By means of a jural relation as a point of reference we reach in the last result a thing element which is ultimate (i. e. a material substance).

If, however, the performance made by C is of legal tender paper money, it is to be observed that the thing element is ultimate but is constituted of two ultimate elements—matter and motion. The paper which is tendered is material substance and simply as material substance has little value. The value of paper money does not reside in the material substance and this value is not accurately a quality of matter. It is an independent and external thing element. It is not as might be supposed an idea or a subjective state but is a form of motion. The state has declared the legal effect of acts dealing with legal tender paper money. The value of this paper resides essentially in behavior or conduct which clearly is a form of motion. Where a distinction is made in larceny based on the value of the thing asported, it will be noticed that there can be no trespass of value or any asportation of value, since value is only a form of motion or behavior; so that the greater or lesser liability of grand and petit larceny depends on two ultimate thing elements (i. e. matter and motion) only one of which is affected by the criminal act (i. e. the material substance, by trespass and asportation).

(3) *Infra-jural relations.* Infra-jural relations (other than jural things) are often regarded as thing elements (i. e. of jural things) or as points of reference to jural relations. A jural thing is a *future* infra-jural relation, but there may be *present* infra-jural relations which become parts of the future jural thing. Infra-jural relations considered as intermediate (i. e. non-ultimate) thing elements are abundant and they constitute the content of all unpolarized legal relations when there is a *res* which can be possessed. Ownership (i. e. the relation of a human being to land space or to a material substance) and the fact (in contrast with the right) of possession are important and familiar illustrations. This use of the term may coincide here with interest which hypothetically is protected by a legal relation.

**4. Classification of things and thing elements.**—Various dichotomies have been employed to separate things or thing elements into classes.

An ancient Roman division was that of *res mancipi* and *res*

nec Mancipi. Res Mancipi included all agricultural substances—slaves, beasts of draught and carriage, and also land. For the conveyance of these thing elements, a solemn Mancipatio was necessary. Res nec Mancipi included other substances such as money, clothing, tools, and such animals as elephants and camels. For the conveyance of them an informal traditio was sufficient. This was a classification based peculiarly on the social constitution of the early Roman State and it did not meet the needs of a developed system of law.

The next classification which came in use in Roman law and in the Civil law of European countries was that of res mobiles (movables) and res immobiles (immovables). This classification attempted to state a natural difference in material substances but since it was limited to material substances, it could not become a major classification. It is synonymous with the division in our law of chattels and land. While the classification of movables and immovables can in strictness apply only to material substances, yet the law has attempted for various purposes (e. g. taxation, rights of foreign incidence) to give a local situation to thing elements which in their nature can have no situs. For example, rights are often treated as if they were material substances having a local situation. This is due either to faulty theorizing or else is pure fiction since a right is purely a jural concept and is no way limited or defined by space.

The Anglo-American division of real and personal property is the most extensive one used in law since the early Roman division of res Mancipi and res nec Mancipi. There are also certain analogies between them. Real property was that concerning which a real action was maintainable; personal property was that concerning which a personal action was maintainable. Real actions in the beginning were called feudal actions and they represented the economic situation of the age in the same way that the ceremony of Mancipatio for res Mancipi reflected the economic situation of the early Roman state. But neither of these divisions was or is inclusive of the whole field of thing elements.

The rights of corporal integrity, reputation, and other personal claims, the infringement of which gives rise to personal actions are not personal property. The division of real and per-

sonal property is limited to thing elements that have economic value and it does not extend to personal (i. e. non-economic) thing elements.

This division which is an historical one only, is of no scientific utility, since the nature of the thing elements to be classified depends on an external matter (that is, the kind of action). Conceivably the whole classification could be destroyed at one stroke by reclassifying all actions as personal. The Roman actions in personam and in rem from which the distinction was derived differed only in one formal respect, that in an actio in personam the 'intentio' (the part of the formula by which the claim is concluded) names the defendant, while in an actio in rem the intentio did not name the defendant.

**5. Other divisions of thing elements.**—In Roman law there are various classifications of res, some of which have considerable practical importance in modern law, but it is necessary to observe that the term 'res' was limited by the Roman lawyers to the concept of property and that for this reason none of these divisions is or can be inclusive. Some of these divisions of importance or convenience are the following:

(1) *Res corporales and res incorporales*. Corporeal things were defined by Gaius as those which were subject to the sense of touch, such as a farm, a slave, a garment, and gold. Incorporeal things were such as an inheritance, a usufruct, and an obligation. This division is peculiar in two respects: (a) It is a division of one kind of material substances in contrast with one kind of rights; (b) it is incoherent. It is the basis of the distinction between what is technically known as *ownership* (jus in re propria) and what is known as *incumbrance* (jus in re aliena).

Ownership, in the technical sense, is limited to jural relations that have a substrate (i. e. a thing element) which is susceptible of economic use. If *A* is the owner of Blackacre, *A* can make economic use of it. This relation of *A* to Blackacre, however, is not the jural relation of ownership but is one of the substrates of that jural relation. The land itself, the 'corporeal' thing, is a primary substrate and *A*'s physical relation to the land is a secondary substrate. Both are thing elements and the secondary



substrate, since it is relational, is an infra-jural relation. Therefore, the *right* of ownership is strictly a jural relation of *A* to other persons, but when it is said that *A owns* the land, the reference is to the infra-jural relation protected by the right of ownership.

If *A* grants an easement of travel over Blackacre to *B*, *B* has an incumbrance of Blackacre. Here, again, the same order of substrates appear as in ownership. The land is the primary substrate of the easement; *B*'s physical relation to the land (i. e. his ability to use it) is the secondary (infra-jural) substrate. The infra-jural substrate is protected by the easement right. But in this case, *B* is not said to be the *owner* of the land. In this lies the incoherence of the attempted distinction on a basis of rights. The right of ownership is no more corporeal than the right of easement. The rights differ, it is true, in their extent but they do not differ in their nature. Still the usage is convenient and it may be put on rational ground. When it is said that *A* owns Blackacre, what is meant is that *A* has a right of ownership with respect to the primary substrate called Blackacre. It is a clear instance of metonymy where an infra-jural relation is substituted for a jural relation. The employment of this metonymy is convenient and fixed in our habits of speech, but the division of 'corporeal' and 'incorporeal' things is an analytical accident which has no place in modern analysis.

(2) *Res in commercio and res extra commercium*. *Res in commercio* are those which may be subjects of ownership. *Res extra commercium* are those which are not subjects of ownership. In Roman law, there are three classes of such thing elements: *res divini juris*, *res publicæ*, and *res omnium communes*.

(a) *Res divini juris* no longer have any importance for purposes of classification since *res sacræ* (e. g. churches) and *res religiosæ* (e. g. cemeteries) are now owned by various forms of church societies. In all the states of the United States but one (West Virginia) such societies may be incorporated, and where they are not incorporated as private corporations, ownership is vested in territorial parishes, in a corporation sole, or in trustees.

(b) *Res publicæ* are still of large importance. What is used by the State as sovereign can not be the subject of ownership since there can be no strict-type legal relation between the sovereign and subjects. For convenience, these relations may be classed as mesonomic relations. The same observation perhaps also applies to the thing elements controlled by counties which in our constitutional theory represent the State in local divisions of the State's territory. The thing elements controlled by municipalities, however, are treated in some respects on the same footing as where there is ownership by a private corporation, and, again, in other respects, as if these thing elements were withdrawn from the operation of law. For example, the lands or chattels of a municipal corporation are not subject to levy of execution. In general, also, there is no responsibility in the use of such thing elements if a 'sovereign' function is involved.

(c) *Res omnium communes* in Roman law included the air, flowing water of a natural stream, the sea, and the sea-shore. There is an important distinction between property and ownership (later to be discussed) but the meaning here is that flowing air, flowing water, the sea, and the sea-shore were not things that could be owned. That, also, in general, is the rule of modern law. Air can be inclosed in a container itself air-tight, and there is no theoretical reason, then, why this air can not be a substrate of ownership. Ownership is freely recognized in air chemically or physically manufactured as where oxygen and hydrogen are separated by electrolysis of water. Nor can there be doubt that natural air which has been liquified is a substrate of ownership. What is said here of air is more obviously true of water, since water in liquid and solid form is commercially of great importance.

The meaning, therefore, of the rule that flowing air and flowing water can not be owned is that while air and water are in free motion, they are *res nullius*; they are in the same case as wild animals which are in a state of natural freedom. Until they are captured, they are not in the ownership of anyone.

While flowing water and free air are not owned yet they may be substrates of rights other than ownership. Easements may be

acquired to make use of flowing water. By the common law, easements could be acquired by prescription to the flow of light over the contiguous land of another. The rule, as to light, is generally otherwise in America, but such an easement can be granted everywhere.

Various other thing elements come into consideration here. An interesting example is that of news. Neither news, nor any idea, as such, is or can be a substrate of ownership. The literary statement of news facts can be owned and can be protected in the special form of copyright, but the news facts themselves are beyond the possibility of ownership. The Supreme Court of the United States has declared that an injunction was properly issued to prevent a competitor from making commercial use of news taken from public bulletin boards and from newspapers. The court's theory is not entirely clear but the decision could have been based on the view that news is a substrate of property rights not subject to abandonment by an early publication in the normal course of business, as an exception to the general rule governing common law copyright.<sup>1</sup> This proposition must be clearly distinguished from the rule of unfair competition. Where news is a substrate of property (rights) the thing element is a literary form of matter embodying a fact or an assertion of fact. Where unfair competition is involved, the thing element is the relation of the complaining competitor to the public. In the one case the wrong is the appropriation by imitation of a form of matter; in the other, the wrong is an unjustifiable interference with a social relation.

Another novel question is presented concerning the legal position of those who have established radio stations for broadcasting programs which have advertising value to those by whom or for whom the programs are issued. The question here is of ownership and of property. If *A* has established at large expense a broadcasting station and has made a prior appropriation of a definite wave length, what does *A* now own beyond the material

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<sup>1</sup> *International News Service Co. v. Associated Press* (1919) 248 U. S. 215, 63 L. ed. 211; (Dist. Ct.) 240 Fed. 983; (C. C. A.) 255 Fed. 244. For a discussion of the case see: note (1919) *Illinois Law Review* 13:708.

equipment?—or if he owns nothing beyond the material equipment, what property rights has he acquired, assuming no question of unfair competition to be involved? It is clear enough that the problem of ownership is excluded. If there is a substance called ether it is *res omnium communes*. The transmitted force, the series of waves, can not be a substrate of ownership because their existence is measured by the velocity of light; they cease to exist for practical purposes at the same instant that they are created. The air space is not owned by *A* either because it is already owned by others or else is *res omnium communes*.

Exclusion of ownership, however, does not necessarily exclude property rights. We have seen that news can not be the substrate of ownership but that in theory, at least, it may be the substrate of property rights. Does radio communication submit of similar analysis? That is to say, ownership being excluded (except of the physical equipment) may there be property rights in any of the features that make radio communication possible? This question differs from any of the others where a property right is recognized. A trade secret is an idea put to industrial use in competition with others who do not have that secret but who may lawfully gain it if no force, fraud, or breach of contract is involved. A common-law copyright is protected so long as there is no abandonment by publication. A common-law trade-mark is protected in the public use of it. These are all either ideal-material thing elements, or, as in the case of registered trade-mark and trade-name, protected *infra-jural* relations. All these instances involve the notion of something created and not simply of something appropriated. A common law trade-mark, it is true, presents not only the feature of creation, but also, at least in a wide sense, the feature of appropriation by commercial exploitation of a market. The feature of appropriation, however, is only the measure of the extent of the right over that which is created, so that the creative element is, at least hypothetically, the basic one. In radio communication, there is not present the feature of creation but simply that of appropriation. The broadcaster does not create the wave length which he uses. He does create the wave, the concrete motion of corpuscular bodies or perhaps of ether. But having created that motion, it

hardly seems possible to say that he can have any further interest in it than to see that it may continue to exist on equal terms with similar motions produced by others and including also protection against fraud.

Juristically, the radio problem is analogous in certain respects to rights of common, to rights of user in co-tenancy as between the co-tenants, to stream rights in surface or subterranean waters, rights in the flow of gas and oil, and to what Holland calls "ordinary rights" (e. g. unmolested pursuit of an occupation, free use of highways). The user of a highway can not claim that because he was the first one to travel over a given path, that no one thereafter shall pass over the same path, but he can claim that while he actually is using a path no other shall molest him. It would seem clear that it lies in the competence of the sovereign to regulate the use of the ownerless air space in whatever manner it can and sees fit to avoid collisions of interest where access to the air space is open to all on equal terms. No subject can juristically have any claim of protection of liberty or property in that which concerns all other subjects in equal degree.

(3) *Res fungibiles and res non-fungibiles.* A *res fungibilis* is a thing representative of a class of things. Every mutuum (loan for consumption) whether of money, grain or merchandise, involves *res fungibiles*. This category also is of importance in the law of sales. It is to a large extent equivalent to 'emptio generis.' There may be a sale of an aliquot part of an identified mass of fungible things. In such case, according to the prevailing view, the buyer and seller become tenants in common of ideal parts of the mass.

(4) *Divisible and indivisible things.* Divisible things are those which can be separated into parts where the parts retain the nature of the whole. Thus land space may be divided either vertically or horizontally into an infinite number of parts, where each part, after division, remains of the same nature as the whole. Physical thing elements may also be divided in a similar manner but there is a limit in the process of division beyond which it is impossible to go without changing the nature of the thing ele-



ment. Thus, when water is reduced to its chemical elements of hydrogen and oxygen, its nature has been destroyed by this chemical separation. Again, a bolt of cloth can be cut into a very large number of parts, but the nature of the thing would be changed far short of chemical division. If the cloth could be reduced to the threads from which it was woven, the thread would not be cloth. On the other hand, if the cloth were cut into a coat, there could be no division of the coat into separate coat-parts.

This category is not one of pure logic. It is a concept with a logical form but with an economic content. It would, for illustration, be impossible to state as a matter of logic how much could be cut away from a particular coat without destroying the concept of coatness.

There also may be an ideal division of indivisible things. For example, there may be a sale of an undivided half-interest in a coat. This convenient figure of speech involves considerable analytical difficulty and it has provided highly divergent juristic explanation. One view is that the 'partes pro indiviso' are parts of the original right; another view is that they are ideal parts of the original thing element. The view taken here is that the original complex of rights is destroyed and is replaced by new complexes of polarized and unpolarized rights in a communio of single ownership and single possession in a new persona. This explanation suffers the inconvenience of considerable complexity, but here, as elsewhere, where the facts themselves are complex, this is a necessary evil.

(5) *Principal and accessory things.* This is a division based on economic relativity. It is not, therefore, a pure logical division, but it has great practical importance in the law of fixtures, accession, transfer of land and chattels, and elsewhere. Its importance is especially manifest where a thing element is named without naming or describing its accessory elements.

**6. Ownership.**—There are two types of definition of ownership. According to the first, ownership is a certain kind of jural relationship; according to the second view, it is an

*infra-jural* relationship. For example, Austin defines dominion (synonymous, according to Austin, with ownership and property) as a "right indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration, over a determinable thing." An example of the second type of definition is that of Salmond who says that "ownership in its most comprehensive signification denotes the relation between a person and any right that is vested in him."

Each of these illustrative definitions also shows the range of application of the idea of ownership whatever be the base of departure. Austin's definition is limited to rights pointing to "permanent external objects *not* persons." Salmond's definition exhibits another extreme since ownership in a generic sense is the (*infra-jural*) relation "in which a person stands to any right vested in him."

Whether ownership is regarded as a *jural* relationship or as an *infra-jural* relationship, the range of possible applications may be shown in progressive steps as follows:

(1) Where the thing element is one (a) which has exchange value; (b) is one which can be possessed; and (c) is not the substrate of a *jus in re aliena*.

It may be noted at this point that there is a distinction between economic pecuniary value and exchange value. A father's right to the economic services of his infant child has no exchange value; the right is not one which can be assigned. Apprentice agreements *juristically* arise out of a different paternal power. Again, the power to make an offer has economic value but it has no exchange value. The elements in the above illustrations are *infra-jural* relations which must not be confused with the *jural* relations which accompany them. In this entire discussion we refer to *jural* relations or thing elements without discrimination, since both are now under consideration.

This group includes typically land and chattels but does not include, for example, copyright, *servitus*, debts, a father's right to the services of his child, *inchoate dower*, and corporal integrity. The latter examples are of things which either have no exchange value (i. e. they can not be transferred to another) or

else they can not be possessed. Thus copyright has exchange value but it can not be possessed. Inchoate dower, as the law stands, has no exchange value nor can it be possessed. The human body regarded as an object and as the point of reference to corporal integrity is possessed but it has no exchange value.

(2) The next step progressively is to include (by way of addition) things which have (a) exchange value; (b) which can be the substrate of economic use; and (c) which are not substrates of *jura in re aliena*. Typical examples of this extension are copyright, trade-mark, trade name, trade secret, patent of invention, but not choses in action, simple powers to take ownerless thing elements (such as wild animals, subterranean oil or gas, etc.), corporal integrity, etc. A copyright can not be possessed but economic use may be made of the *infra-jural* relation which it protects.

(3) The next step is to include in addition to the things already enumerated those (a) which submit of economic use; and (b) which have exchange value. This extension will draw in a large group of *iura in re aliena*. Easements, for example, will now be included, but choses in action, etc., will still fall outside the limitation. An easement has a substrate (i. e. land) which submits to liberty (i. e. the land itself can be economically used within the limits of the easement); but a debt can not be factually dealt with. The creditor of the debt has his claim but he can not use it in its aspect of relation. A relation can not be used; it simply exists and it exhausts itself by mere existence. It is sometimes said that a landlord possesses his rents, that an annuitant possesses his annuity, that a bondholder possesses his interest, and that a master possesses the services of his servant. This is a purely metaphorical extension of the idea of possession and it is also an analytical fallacy. Possession can not be attributed to acts (e. g. collecting rents) nor can a claim (e. g. the right to have rent tendered) be acted by the dominus of the relation. In duties, the active side of the relation is that of the servus. There is a power to tender and a power to receive duty performances but these power acts do not exhibit the legal idea

of possession and at the most are only evidentiary of the existence of continuing legal relations with which they are connected.

(4) The next progressive extension may include as additions all other assignable things that have exchange value. This will now include choses in action (so far as assignable in law or equity) but will still exclude inchoate dower, a father's rights to the services of his child, corporal integrity, etc.

(5) The next step may include as additions all other things of economic value whether assignable in their nature or by rule of law. Some things are assignable by nature but not assignable in law. At common law a chose in action could not be assigned according to rule of law but the nature of a chose in action does not prevent a similar relation being vested in another by way of what is metaphorically called 'assignment' and while the law courts did not recognize such assignments the chancery court gave it effect by indirect methods.

(6) The next step in advance may include all other things which have economic value but which in their nature have no exchange value. An example of this is the power to offer contractual relations. This power has been protected by American courts under the constitutional guaranty of property against legislative invasion. The power to offer is for this purpose entirely different from the power to accept a contractual proposal. The power to offer is in its nature unassignable, but the power to accept in its nature is one which may be assigned to another. The power to accept an offer whether of contract, grant, or assignment, has at once economic value and exchange value.

(7) The final step will include all other things, including those which have no direct economic value. Examples of this final addition are corporal integrity, corporal freedom, power to enter into personal relations (e. g. marriage), etc. These things were regarded by the writers of the Natural Law period not only as substrates of ownership but as objects of property.

7. **Definition of ownership.**—Ownership may be considered either as a jural relation or as an infra-jural relation, but the balance of convenience seems to favor the latter alternative. Usage which is one of the principal factors in the test of convenience puts emphasis upon the relation of the owner to a thing element rather than on the jural relation which is the basis of his ownership. When it is said that *A* owns Blackacre the reference clearly enough is not to the *right* of ownership but to the infra-jural relationship which is the substrate of the right of ownership. There is, therefore, a distinction between ownership, considered as an infra-jural relation, and the *right* of ownership which is a particular kind of a right, but no convenience is served in speaking, as Salmond does, of the ownership of rights. It is true that ownership as an infra-jural relation is contrasted with possession which also is an infra-jural relation, but it is not analytically correct to say that the “ownership of a right is opposed to the incumbrance of it.” One does *own* his rights. If one stands in jural relation to another as dominus it is tautology to say more; nor can there be an incumbrance of a right. There are rights of incumbrance (*iura in re aliena*) just as there are rights of ownership (*iura in re propria*) but in each case the point of reference is not the jural relation but the infra-jural relation.

In constructing a definition of ownership, choice is necessary as to the range of things which shall be included. To include them all is inconvenient. Professional usage may be a guide and that usage, it would seem, justifies inclusion of the first two of the above enumerated classes of things. The first group is universally admitted as proper to be included (e. g. land, chattels). The second group also seems reasonably open to admission since there is abundant evidence of the usage which speaks of ownership of copyrights, trade-marks, etc. The third group which includes certain kinds of *iura in re aliena* is perhaps not so clearly evidenced, but it seems justifiable and it would be convenient to include them since there is no unnaturalness in speaking of owning a right of way. But this usage would not include the *iura in re aliena* known as securities (e. g. pledge). That is the limit to which the term ownership can be carried and still preserve the



logical nature of the underlying idea. On that basis, *ownership is the infra-jural relationship of the dominus of a jural relation to a thing element which can be economically enjoyed.*

**8. Ownership as a juristic hypothesis.**—In the sense of an infra-jural relation, ownership is outside the jural sphere. If *A* is the owner of Blackacre, *A* stands in a certain relation to Blackacre which permits *A* to make use of Blackacre in ways not cut down by *A* by his own act in creating limiting rights in Blackacre in favor of others (e. g. by leases, easements, securities, etc.). The law is limited to the realm of constraint and such infra-jural relations fall entirely in the field of non-constraint or liberty. The law stops where constraint ends and, therefore, it follows that there can be no legal demonstration of ownership considered as an infra-jural relation.

But there is not only an infra-jural relation of ownership but also a jural relation of ownership; that is to say there also is a right of ownership which does, of course, involve the element of constraint. The right of ownership of material objects is analyzed into various specific ideas, such as 'utendi,' and 'abutendi,' 'fruendi,' 'fructus percipiendi,' 'possidendi,' 'alienandi,' and 'vindicandi,' or, as Holland has classified these specific attributes, into three divisions of possession, enjoyment, and disposition.

Possession is both a fact and a right (claim). Enjoyment is a liberty and falls outside the law. Disposition is a power and it does not enlarge what already is given. Enjoyment being excluded as non-jural (in this case being the infra-jural relation of ownership as above discussed) there is left only the right of possession. Since there may be the possession not only of owners but also of lessees, life-tenants, and mortgagees, it is necessary to find ownership in a particular kind of possession or in a particular variety of right of possession. *Ownership, is the most ultimate right of possession and nothing else.* The law at no point deals with ownership apart from possession or the right to have possession, and in no case does it determine, except negatively, a right of ultimate possession. The common-law actions including ejectment which deal with invasions of land or chattels are all based on the idea of possession or the right to have posses-

sion. Possession is said to be evidence of title, but if by this is meant evidence of the most ultimate right of possession, it is a pure fiction since that question can never be determined in a possessory action. In the early history of our law an attempt was made to work out remedies on a petitory basis<sup>2</sup> but it is clear that our modern Anglo-American law is based on possessory remedies as the only workable practical theory possible without an official compulsory authentication of titles. For land and chattels (otherwise as to patents of invention, and registered trade-marks) and rights that grow out of them, ownership, in general, is only a juristic hypothesis and in practice means only the most ultimate

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<sup>2</sup> It may be doubted whether, except in the very earliest times, the *droit-ural* (or petitory) action of writ of right (formally abolished in England in 1833) had any significance except as a special form of possessory action. In the early period, the writ was brought in the Court Baron of the lord under whom the land was held. The right could there be traced to its source but since the original right could be cut down by prescription, it follows that the original title with the efflux of time became of increasingly less importance. The writ of right was a remedy concurrent with all other real actions. It was the most difficult of them all. At first the method of trial was wager of battel for which later was substituted the *grand assise*. The procedure of writ of right also was heavily burdened by numerous possible *essoins* and interminable delays through the use of vouchers to warranty. No litigant after the introduction of the possessory actions resorted to it except as a last refuge. The writ of right law lay only to recover a fee simple and was employed only when a possessory action was already barred or when a judgment had gone against the demandant in a possessory action. It served the same function as the new trial in ejectment. The common belief that the writ of right was a '*droitural*' action and not in essence a possessory action arises from the nature of the demandant's pleading which alleged a claim "*in dominico suo ut de feodo et iure*," but the demandant needed to prove only an actual seisin in himself or in his ancestor within the time limited by law. This time was at first fixed as from the reign of Henry II and after various changes was finally fixed at sixty years. That the writ of right soon after its introduction became a mere possessory action is shown by a reverse explanation of the reasons which permitted an amendment of the writ of entry (a possessory action) to writ of right. This amendment was permitted when the entry was too ancient to be proved '*proprio visu et auditu*.' Originally the writ of entry could be tried on what the vicinage had seen and heard but as the claim of title got longer and many generations had passed, there was nothing for it but to find the best possession. The writ drew in question only the rights of the parties to the suit; the tenant could not defend by showing a *jus tertii*; on the trial, *prima facie* possession could be established by showing a pernaney of rents and profits; and the form of the judgment was "that (demandant) recover his seisin against (tenant) quit of the said (tenant) and his heirs forever." These facts seem to point conclusively to the possessory nature of the writ of right in spite of its '*proprietary*' classification.

possession or right of possession which is shown in litigation as between the parties. In general except in special instances easily explainable on grounds of policy and always where the question of right of possessing is in question as between the parties, a *jus tertii* defense is inadmissible. A plaintiff must recover on the strength of his own claim of right to possess and can not rely on the weakness of the defendant's right to possess as to other persons.

As already suggested, the right of ownership in our law is only a right to possess but under a system of registration, such as the Torrens system, the right of ownership would become a reality and not a mere hypothesis.

Prescription statutes are a recognition of the practical difficulty of determining an ultimate right to possess. There are certain facts which on the surface are in apparent conflict with this view of the hypothetical character of rights of ownership of land and chattels. Prescription statutes often involve an element of color of title but this requirement goes only to the question of the good faith of the possession. In bills to remove clouds on titles, there is apparently a determination of ownership but in fact a determination only of the better right of possession as to the parties bound by the decree. In proceedings in rem, the rights of all parties are cut off in favor of the buyer at the sale. The operation here is negative, although it also is universal. The jural effect is only momentary since the creative and destructive effects of possession begin to operate instantly. So long as possession may operate as a basis of the claim to continue to possess, the right of ownership must remain hypothetical or imperfect.

**9. Property.**—There are as many different possible applications of the term property as there are of the term ownership. The term property is used often in two senses: (1) As the thing element which is the substrate of a jural relation (e. g. land, chattels); (2) as the jural relation itself which has a proprietary substance. The first usage is that of the layman; the second is the technical usage of lawyers. Therefore, as signifying a certain kind of jural relation, the term may mean those jural relations involving a jural thing of any one of the following types:

(1) Jural things of exchange value with a thing element which is owned by the dominus of the property relation and susceptible of possession. Examples of this class are ownership of land and chattels.

(2) Jural things of exchange value with a thing element which is owned but not susceptible of possession. Examples are patent of invention, copyright, good-will of a business.

(3) Jural things of exchange value with a thing element not owned by the dominus of the property relation but possessed or economically enjoyed by him. Examples are easements, leases of land, bailments of chattels.

(4) Jural things of exchange value with a thing element not owned by the dominus of the property relation and not possessed or economically enjoyed by him. Examples are, inchoate dower, power of re-entry in a term for years, power of recaption, claim to have possession.

(5) Jural things of exchange value with an infra-jural thing, one of the elements of which is an act. Examples are claims to economic services and to pecuniary performances.

These examples are of *jura ad rem* (rights to have rights). Thus, if *S* owes *D* a sum of money, *D* has a claim to an act of tender of the sum due. The jural thing to which the claim refers is the sum total of the economic elements which are realized in an act of tender. This jural thing is an infra-jural relation. If and when the tender is made, *D* has the power to accept it and thereby to make himself the owner of the coins tendered. Present ownership in *D*, therefore, is not an element of the jural thing to which *D*'s claim refers.

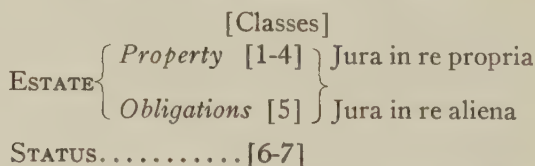
(6) Jural things of economic value but of no exchange value. Examples are immunity from fraud, access to public ways, power to enter into relations of economic value, parental claim to child's services.

(7) Jural things of no direct economic value. Examples are



a man's reputation for social relations, corporal integrity, life, family relations.

Usage is found for the meaning which includes all of the above seven classes. Usage also is found for the meaning which is restricted to the first of these classes. Both of these views are inconvenient extremes. There is also an intermediate view which includes the first four of the above classes. The problem of selection here is even more difficult than in the definition of ownership. The natural choice would be to include all rights having reference to a jural thing with a direct pecuniary or economic value, whether an exchange value is found or not, and regardless of whether the thing element is assignable or not. The question of assignability is juristically of little importance since the answer is not an inherent one and depends on the state of the law at a given time. But the natural selection which would embrace the first five of the above classes runs counter to a juristic tradition of considerable importance which goes back to the Roman sources. The distinction of polarized and unpolarized jural relations is one which runs athwart all legal systems and is one necessarily recognized in all formulations of legal rules whether in codes or otherwise. This distinction would be obliterated by giving the term property its natural meaning. The juristic tradition limits the term to those jural things which have an exchange value intrinsically, and which are objects of unpolarized jural relations. A diagram which includes all of the above classes of jural things on the basis of this definition follows:



[*Explanation*: Estate includes all economic rights with a substrate having an exchange value. Status includes all rights with a substrate which does not have an exchange value. Jura in re propria are not coincident with ownership as already defined. A ius in re propria is one which admits the existence of a conflicting jural relation (i. e. jus in re aliena) which limits the scope of its jural thing (e. g. lease, security, servitude).]



**10. Conceptual nature of thing elements.**—Legal science is conceptual in all of its parts. Jural relations are concepts since the factual elements which are the substrate of jural relations are only known in the jural process in the form of concepts. The elements of a jural relation, persons and acts, likewise are conceptual. Persons are the conceptual points of reference of the polarity of jural relations; acts are the concepts of the content of jural relations and of their evolution. Rules of law themselves are (conceptual) formulas and all legal operations are purely conceptual. This generalization extends even to the factual realization of legal rules.

Thing elements also are conceptual. This may be best illustrated by considering a unique chattel, let us say, a Raphael. There are here three orders of ideas to be distinguished. First, there is the picture itself; next is the subjective impression of the picture; and lastly, there is the concept of the same thing. We have no means of knowing the nature of the picture itself. The subjective impressions of the nature of the picture will differ with each observer; they are, therefore, manifold and no two of such impressions are or can be exactly similar. The concept of the picture is a jural idea produced by oral evidence describing the picture or perchance by 'real evidence' (i. e. the production of the picture itself to the view). If specific performance is decreed, it is of a thing which falls within the concept and not within a subjective image. In the case of fungible goods, the conceptual nature of thing elements is plain. In this instance, the thing element is not any particular material thing but a conceptual representative of a class of thing elements.

The conclusion may be inferentially demonstrated in another way. A concept is indivisible, timeless, and spaceless, but a specific (material) object according to the testimony of our senses is divisible, exists in time, and has a definite spatial meaning. Where a concrete thing is legally indivisible, the legal reality does not coincide with our impression of the underlying fact. If there is a contract of sale of a specific coat, the contract duty is not satisfied by tender of the same specific coat divided into two or more parts. The coat can be divided but the concept can not be divided. The thing element for technical purposes is indi-

visible. There are various thing elements which clearly do not depend on sense impression. Space, ideal things (e. g. fungible things), infra-jural relations, and jural relations are thing elements which unmistakably are only knowable in the jural process as concepts; and, if it were not otherwise demonstrable, it would be difficult to suppose that in one class of instances thing elements are conceptual because they must be, and that, in the remaining instances, thing elements for legal purposes are non-ideal because they are knowable in the preliminary stages of the jural process by sense impressions. Such a distinction would be comparable to that of *res corporalis* (e. g. a chattel) and *res incorporalis* (e. g. a claim to have a pecuniary performance). It is inconvenient and unnecessary.

**11. Theories of the nature of land.**—Land and chattels are commonly considered as species of the same genus. *A chattel is any material substance knowable by any one or more of the senses* (e. g. a table, water, gas). This meaning would exclude electric force, running water (force), air space, air currents, and light, etc. There is also a usage which limits the meaning of 'chattel' to material substances knowable to the sense of touch. It is, however, more usual to give the term 'chattel' a wider meaning to include thing elements which are *iura in re propria* other than land (e. g. chose in action). Another still wider application makes the term synonymous with 'personal' property (e. g. term for years). The meaning first stated has certain advantages for practical purposes over the others and is the one adopted here.

In its original meaning and in the popular sense of to-day, land was a more or less permanently situated chattel. In its early signification, land was arable soil. In the time when agriculture was the chief economic pursuit the surface of the soil and the structures put on it were thought of as constituting the essence of land. But the maxim '*cuius est solum, eius est usque ad cælum*' although practically of little significance had profound influence on the later development of the land concept. It involved one of two alternatives: (a) That the owner of the soil had an exclusive power of occupying the superjacent air space;

or (b) that the owner of the soil also was owner of either the air space or the air column. There are various possible views of the nature of land which may be enumerated as follows:

(1) Land is arable soil and nothing else. Ownership of land is accompanied by exclusive powers to make use of the superjacent space in geometrical lines diverging from the center of the earth without limit, and to appropriate the substances of whatever sort beneath the arable soil. These powers are appurtenant to the principal right of ownership in the surface and pass by conveyance and are inheritable as necessary incidents of the principal right.

(2) "Land is the solid material of the earth whatever may be the ingredients of which it is composed, whether soil, rock, or other substances." This is the definition of the California Civil Code.

(3) "Things in the legal sense are corporeal objects only" (Sec. 90). "The right of the owner of a piece of land extends to the space above the surface and to the substance of the earth beneath the surface. The owner may not however forbid interference which takes place at such a height or depth that he has no interest in its prevention" (Sec. 905). This is the statement of the German Civil Code.

(4) Land is the solid portion of the earth and the air space above it. This view embraces several varieties. One variety consistent with the natural import of the maxim '*cuius est solum*' extends ownership (if not also possession) to an indefinite limit. Another limits ownership to a range consistent with the free economic use or possible use of the surface. An intermediate variety of view expressed by the American Uniform State Aviation Act concedes ownership in the superjacent space without limitation subject to an easement to cross the superjacent space in aircraft.

At this point we find a theoretical transition in the views enumerated. Here land is for the first time constituted of material substances and also of geometrical space. The remaining views are strictly spatial theories.

(5) Land is a surface area together with accessory powers to make use of the superjacent space and to make use of the subjacent space and the substances found there. It will be noticed that this theory has a resemblance to one first set out. A surface area is a geometrical plane but it is an irregular one, changing with the contour of the soil.

(6) Land is a tri-dimensional space. This view also may have several varieties. It may be a space reaching from the center of the earth to an indefinite height or it may be a space limited in extent above and below the surface.

Of these enumerated views (which reduce to two ultimate forms: (a) The view that land is material substance, and (b) that land is only space) the one that presents the fewest practical difficulties is the last, namely, that land as a thing element is not a material substance or the concept of it, but is purely a geometrical idea with three dimensions. The soil and the substances in the earth and the structures built upon the surface are merely chattels which go with the land by conveyance and inheritance. While thing elements may be treated by the law for purposes of conveyance, inheritance, and otherwise, as land, yet the distinction between land and chattels is intrinsic and the law can not alter the distinction. The differences between the concepts of space and the material substances which occupy space are matters of logic and not of law, and it is demonstrable that what the law deals with in the last analysis as land is space and nothing else. All the chattels (i. e. the earth substances) that occupy land space might be removed and the land space would remain as it was in extent. Trespasses to land may be committed not only by interferences with the soil and buildings but a mere intrusion into the space above or below the surface is also a trespass even where there is no appreciable economic interference and even where there is economic advantage to him who owns the space.

It may be said that whatever the logical compulsion of the distinction, the law may entirely ignore it but this does not appear to be true. When the California Code defines land as the material substances of the earth, the issue is clearly presented. If, by hypothesis, *B* the owner of Blackacre grants a term of



years for a truck garden to *A*, owner of Whiteacre, and if the owner of Whiteacre removes the top layer of black soil of Whiteacre and covers the clay surface of Blackacre, then both *A* and *B* would be the owners of land within the same geometrical space. While *A* was transporting his soil, if the soil then still was land, it was an instance of land in motion. These conclusions can only be escaped by relating the concept of land to a definite space and in that event the space is the ultimate thing element and not the substances that occupy it.<sup>3</sup>

12. **Ownership of land.**—There is a distinction between land as a thing element and ownership of land. While the view that the concept of land is tri-dimensional appears to be analytically inescapable, yet it is not clear how far the idea of ownership in space above and below the surface is carried. The problem here is one of policy and not of logic. One American state (California) by statute seems to negative ownership in land **space above the surface**. Two other states (Michigan and Connecticut) refuse ejectment for intrusions in the superjacent space. Other states appear to recognize ownership in the superjacent land space.<sup>4</sup> The prevailing view as to ownership in the sub-surface space appears to recognize rights of ownership without limitation in extent.<sup>5</sup>

The decisions which recognize ownership of land space above and below the surface, do not yet admit of any formulation of a definitely clear prevailing rule which limits the space above and below the surface, but a rule that suggests itself as having the qualities of workability is to limit *ownership* of superjacent air space to the highest limit economically employed for building in the community and to limit ownership in the subjacent space to the lowest depth where economic use in a particular community or state has been carried. The problem of limitation, however, is full of important difficulties in both aspects and the solution in

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<sup>3</sup> The writer is glad to find himself in agreement on the view of the nature of land with an original study (unpublished) by Mr. Stuart S. Ball, which he has profitably consulted, under the title "Can There Be Fee Simple Estates in Horizontal Layers of Land?"

<sup>4</sup> *Ball*, op. cit.

<sup>5</sup> *Ball*, op. cit.



the absence of legislation will be reached by the presentation of concrete problems. In the meantime, the theory of the limits of ownership in the space below and above the surface will remain indefinite.

**13. Ownership of land in horizontal strata.**—Since land is merely a space concept, there is no theoretical difficulty in dividing this space in an unlimited way vertically, horizontally, or even diagonally. Here, again, the solution of the question of what the law will permit to be done as a basis of jural relations is one of policy and not one of logic. The practical considerations that bear on the problem are two: (a) The need of an accurate delimitation so far as possible of thing elements so that they may be dealt with as a basis of jural relations with a maximum of certainty and convenience; (b) the need, also, that after recognition as a basis of jural relations, they may be employed economically with a maximum of convenience and utility.

Land measurements are conventionally surface measures with vertical divisions extending downward to the center of the earth. These surface measures theoretically can be infinitely small in length or in breadth, but the law will not recognize what can not economically serve a practical need in concrete use. A grant of a vigintillionth of an inch on one boundary of land is a legal nullity; it conveys nothing. A similar grant of an unmeasurable line in the middle of a tract likewise would be a nullity, since it could not be economically used by the grantee although it would be an economic detriment to the grantor preventing his passing from one part of his land to another. The law will not and should not recognize the creation of jural relations that have no social utility nor the creation of jural relations that can be employed only oppressively. The law has even gone farther and refused to recognize as a jural relation one which created a new species.<sup>6</sup> The court in that case said: "A new species of incorporeal hereditament can not be created at the will and pleasure of the owner of the property." That rule went perhaps too far but the factors of security, convenience, and utility can not be ignored in the creation of jural relations.

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<sup>6</sup> *Hill v. Tupper* (1863) 2 H. & C. 121.

Land measures which can be conveniently identified and used are not alone necessary for the owners of land but they also are the basis of taxation and the State has a fundamental interest in divisions of land on a basis which does not present too much difficulty in identifying the thing elements which are to be taxed.

The fact that land measures are conventionally vertical divisions is not a mere accident of usage. It is the result of the operation of the law of gravitation. Ownership of land space means the ultimate claim of possession. Normally, it would involve a present possession or present claim of possession. Such ownership in land space can not exist in horizontal strata of space independently of easements of various kinds. If a land space were divided into fifty horizontal ownerships of strata above the surface, the legal difficulties of adjusting the legal relations of each owner to each of the others would be insuperably complex and would work against economic utility. In simpler forms, the idea of multiple horizontal ownership of land space would, of course, present fewer legal difficulties, but in any case, whether simple or complex, it may be seriously doubted whether sound legal policy should not deny the possibility of the creation of such relations. It is perhaps the prevailing professional view that it may be done but it is worthy of notice that in the construction of buildings in metropolitan centers in America on a co-operative basis, the profession is resorting to the device of unitary ownership by means of corporate or trust ownership.

It is not entirely clear how the law has dealt with the problem. Ball's examination<sup>7</sup> of the cases indicates that horizontal division of superjacent land space has been recognized in a few cases; that horizontal division of subjacent land space has been recognized in England in mines; that in the United States such ownership has not been allowed in the case of mines; and that in England and the United States, horizontal divisions of ownership have been recognized in tunnels. The doctrine is highly inconvenient in any case and the results sought could better be attained by refusing to recognize ownership of land as horizontally divisible and by treating such departures as *jura in re aliena*.

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<sup>7</sup> *Ball*, *op. cit.*



## CHAPTER XIX

### SANCTIONS AND REMEDIES

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|------------------------------------|---|
| 1. Two ultimate jural relations.   | 8. Classification of sanctions.               |
| 2. Duty powers.                    | 9. The test of the judicial function.         |
| 3. Sanctions.                      |   |
| 4. Origin of sanctions.            | 10. Administration of law and physical force. |
| 5. Ectophylactic relations.        |   |
| 6. Declaratory judgment procedure. | 11. Classes of remedies.                      |
|                                    | 12. Further classification.                   |
| 7. Sanctional duties.              | 13. Summary.                                  |

1. **Two ultimate jural relations.**—There are two ultimate kinds of jural relations. The first of these relations is the Claim-Duty relation; where the dominus of the relation can require an act to be performed by the servus of the relation and where, accordingly, the servus of the relation is under a duty to perform that act. The second of these ultimate relations is the Power-Liability relation; where the dominus of the relation can perform an act which has the effect directly or indirectly of cutting down the freedom of the servus of the relation or of otherwise changing his legal position.<sup>1</sup>

There is a striking difference between these two fundamental relations in this, that the Claim-Duty relation is or may be a *frangible* relation; while the Power-Liability relation is an *infrangible* relation. Although the servus of a claim is ligated (bound) to his duty, yet in many cases he may break the bond of his duty.<sup>2</sup> His duty requires him to act in one way, but in many

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<sup>1</sup> Duty always implies a restriction of natural freedom. Liability may involve (a) restriction of natural freedom (e. g., landlord's power of re-entry); (b) restriction of an artificial freedom enlarging the limits of natural freedom (e. g., destruction of a claim or revocation of a power); (c) artificial legal enlargement of natural liberty (e. g., offer of contract or conveyance).

<sup>2</sup> For example, a duty to pay a debt, created by a sealed instrument at common law, can not be broken. The action of debt in legal theory is for specific enforcement. Cf. Terry "Leading Principles of Anglo-American Law" § 147, p. 126.

cases he has the power to act in a contrary way. On the other hand, a Power-Liability relation can not be broken. It can be exercised and in that way come to an end. It may also come to an end through the exercise of a conflicting power; it may terminate by the exercise of a congruent power; or it may terminate by non-user.

*Illustrations.* If a note contains a power to confess judgment, the exercise of this power is the end of the power. The power of an agent to ligate his principal may be terminated by revocation. Where there is a choice of inconsistent remedies, as where the claimant may sue in trover or in assumpsit, the exercise of one power terminates the other. Where an offer is made, the power of acceptance must be exercised within a reasonable time.

In none of these cases is the power broken. It is exercised or not exercised or ceases to exist. The reason for this peculiar difference between a claim and a power lies in the fact, that a claim relation is an active relation from the standpoint of the *servus* of the claim relation, while a power relation is an active relation from the standpoint of the *dominus* of the power relation. The bearer of a duty can act adversely to the dominus, but the holder of a power can not in a legal sense act adversely to himself. Where the dominus of a power refrains from exercising his power, he acts neither against the servus of the relation nor against himself. It is clear that by not acting he does not affect the servus. He does not affect himself in a legal sense because a man can not sustain a legal relation to himself.

2. **Duty powers.**—Where there is a duty to do an act, there must be a power to do it. It is a striking juristic fact that a duty as such can not be performed. It may, however, be extinguished by the exercises of a power. There may be a duty to do an act which the servus economically or physically is unable to perform. A debtor may not have the money to pay, but yet he owes the duty, and in legal contemplation he has the power to pay and also the congruent power not to pay. The power not to pay, when exercised, is directed against and affects the creditor. It is relational. Where the dominus of a non-duty power refrains from acting there is no relational fact. The



refraining is not a power, at least not in a legal sense, but a liberty. If, therefore, the dominus of a non-duty power does not exercise his power, he exercises his liberty to refrain, but since liberty means a capability of choice, the dominus of the power also has the liberty to exercise his power. Liberty in the latter case coincides with power, but since anomic relations are of no concern in the law, the capability is expressed by power and not by liberty. It may be pointed out in passing that a duty-power does not involve a liberty. Where there is duty there can not be liberty. Likewise, the power to violate a duty is not a liberty.

3. **Sanctions.**—A sanction as applied to a legal rule is “any conditional evil annexed to a law, to produce obedience and conformity to it.”<sup>3</sup> It “is a second intervention \* \* \* inflicting a specific evil upon a specific person in consequence of a specific act or omission.”<sup>4</sup> Since legal relations are based on legal rules, the term ‘sanction’ may also be applied to legal relations.<sup>5</sup>

A liability is a passive ligation which can only be suffered or not suffered. A liability can not, therefore, have a sanction as that term has been defined. In zygnomic legal relations, a liability is either an evil or it leads to one. In mesonomic relations a liability is often an economic good (e. g., the liability of having an offer made).<sup>6</sup>

*Illustrations.* Where a trespasser is liable to be ejected, the liability itself is an evil. Since, however, a trespasser is still only *liable* to be ejected, the evil is a conceptual evil. The exercise of the power to eject a trespasser is a factual evil. Where there is a power to rescind, the power is a conceptual evil, but the exercise of it is a factual evil.

Under the definition, a sanction exists only where two elements are found: (a) Where there is a breach of duty; and (b) where

<sup>3</sup> *Austin* “Jurisprudence” (4th ed.) 523.

<sup>4</sup> *Terry*, note 2, *supra*, 13.

<sup>5</sup> In Roman law a sanction was the clause of a penal law which provided a punishment. *Legum eas partes, quibus poenas constituimus adversus eos qui contra leges fecerint, sanctiones vocamus*: D. 48, 19, 41; C. 12, 50, 20. For other meanings of the term, see *Austin* “Jurisprudence” (4th ed.) 524.

<sup>6</sup> In no case can a reward or benefit be a sanction: *Austin op. cit.*, note 3.

an evil follows. A breach of duty is always followed by an evil, but an evil may be inflicted on a person which is not a sanction. The breach of a duty is an evil inflicted on the dominus of the claim; this evil is not a sanction. Sanction and evil, therefore, are not synonymous.

The evolution of every legal relation has legal consequences, but the term 'sanction' is limited to that consequence which results when a legal relation is destroyed by internal devolution.<sup>7</sup> This consequence always takes the form of a new legal relation.

*Illustration.* If *A* is owner of a chattel, there are unlimited numbers of similar claims against other persons not to interfere with the chattel. These claims correspond to negative duties. Both the claim and the duty in these cases are unpolarized; the connection between the dominus of the claim and the legally unidentified servi is shadowy. It is only by juristic hypothesis that unpolarized relations can be denominated legal relations at all. Since a breach of such an unpolarized duty can occur in a moment of time, it is accordingly necessary to assume that these duties in like manner are performed in discrete moments of time. Unpolarized relations, therefore, are that kind of relation in which the servus is legally unidentified by the investitive facts, and which, if negative, call for a numberless series of performances. The same also is true of any polarized negative duty as where a seller of a business agrees not to compete with the buyer for a term of years. These performances, whether considered as one continuous performance or as numberless performances in a continuous series, are the evolution of the relation. If *B*, in the example given, converts the chattel, the wrongful act is contrary in motion and opposite in sign.<sup>8</sup> This contrary act results in internal devolution (destruction) of the original relation and the consequence of this devolution is the creation of a new polarized claim and a duty to pay damages for the trespass.

Since there are only two ultimate legal relations and since duties alone have sanctions, it follows that these sanctions are

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<sup>7</sup> For an explanation of the terms 'evolution' and 'devolution' as applied to legal relations, see chap. xii.

<sup>8</sup> The duty was to refrain from a negative act moving toward the dominus of the relation. The wrongful act is a positive act moving against the servus (the former dominus) but from an opposite direction: see chap. i.

expressible only in one or both of these ultimate relations. The sanction of a duty, therefore, is either a new duty or a liability or both.

*Illustration.* If a debtor fails to pay his creditor when the money is due, a new duty immediately arises to pay damages for the breach of duty.<sup>9</sup> This new duty is a sanction and it is called a sanctional duty.<sup>10</sup> The new duty to pay damages is accompanied by a liability of suit. This liability is a sanctional liability. A sanctional duty is infrangible—it can not be broken; it is not sanctionable. It may be specifically enforced by means of the accompanying sanctional liability, but if it is not enforced in apt time, it perishes or is reduced to a lower juristic level.

4. **Origin of sanctions.**—Since duties alone have sanctions, there are four ways in which a sanction may arise: (1) By breach of a positive duty; (2) by breach of a duty for the protection of a positive duty; (3) by breach of a negative duty; (4) by breach of a duty for the protection of a negative duty.

Ordinarily, protective duties do not exist, but the increasing development of the prophylactic function of law will, in another

<sup>9</sup> See, however, Prof. *W. W. Cook* "Powers of Courts of Equity" (1915) *Columbia L. Rev.* 15:37 (45); Prof. Cook says: It is "difficult to maintain \* \* \* that there is any 'right' to damages. \* \* \* If there were, however, it would be violated by non-payment and a new remedial right would arise to be again violated by non-payment, and so on *ad infinitum*." The fact that where the damages are unliquidated a tender does not in any case affect costs proves nothing, since it is clear that where the damages are liquidated a tender does affect costs. Cf. *Terry*, note 2, *supra*, 130. These discussions are very suggestive in calling attention to the peculiar nature of a sanctional right. It seems to us, however, that the true explanation of the matter is that a sanctional right is an infrangible relation. It can not be destroyed by new breach nor can it be destroyed by a tender in any case, although, where a simple contract sanctional right is liquidated, there is a duty in the dominus of the right to accept the tender. The sanction of this duty is shown by its effect on the costs. There is not, if this explanation is sound, any possibility of an infinite series of breaches of an infinite series of sanctional rights. The very difficulty of such an assumption is enough to warrant its rejection without, however, accepting the alternative of a power relation (the permissive theory) as a substitute for a sanctional claim. The permissive theory stated by Dr. *Terry* (note 2, *supra*, 122) has difficulties of its own in getting over the nature of the action of *assumpsit*. Both difficulties are avoided by regarding the sanctional right as infrangible.

<sup>10</sup> The combinations 'primary' and 'sanctioning' rights, or 'primary' and 'secondary' rights, or 'antecedent' and 'remedial' rights, are not

generation or two, create a large body of legal rules dealing with protective duties, and the growth of the practical importance of these protective duties will require a corresponding theoretical development.

If there is a duty not to commit a tort, ordinarily the civil law will not interfere in the face of preparations to do the unlawful act. In exceptional cases, however, the law will not wait until the wrong actually has been accomplished, but will relieve against preparation of the unlawful act by a civil remedy (e. g., prohibitory injunction) which has for its purpose the laying of a new duty fortified by additional conditional sanctions against the wrongdoer. Likewise, if there is a contract duty, ordinarily the law will not interfere in the face of preparations looking to breach, but, in exceptional cases, the law will not wait until the breach actually has been accomplished and will relieve against preparation of the unlawful act by a civil remedy (e. g., decree of specific performance) antecedent to breach of the principal duty.<sup>11</sup>

5. Ectophylactic relations.—In these instances, there is a protected and a protecting relation. They are, therefore, phylactic relations. The relation protected may be called the endophylactic relation and the protecting relation may be called the ectophylactic relation.<sup>12</sup> The endophylactic relation may be likened to the body of an insect, and the ectophylactic relation to its antennæ (feelers) and claws.

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altogether satisfactory. Of these terms, the term 'sanctioning' appears to be the only one worth preserving. Since legal relations normally occur in a connected series with various accompanying collateral relations also connected in a series, the terms 'primary' or 'antecedent' and 'secondary' are too indefinite for precise use, standing alone. That criticism does not apply, however, to the term 'sanctional' right or duty, which in itself indicates what specific legal relation is under discussion. The right from which a sanction flows may be called a sanctioning right. A right which may be followed by a sanction (i. e., frangible right) is a sanctionable right.

<sup>11</sup> *Van Dyne v. Vreeland* (1857) 11 N. J. Eq. 370, 13 N. J. Eq. 143; *Davison v. Davison* (1861) 13 N. J. Eq. 246; cited by *Clark* "Equity" (1920) 110; cf. *Staley v. Murphy* (1868) 47 Ill. 241, 242.

<sup>12</sup> For a further discussion of legal phylaxis, see "Jural Interrelations" chap. xii.



*Illustrations.* If a debt is owing, and the debtor before maturity of the debt conceals property or is about to take property out of the state, there may be, in some jurisdictions, an attachment of the debtor's goods for the protection of the principal relation. In such case, there is a protecting duty not to jeopardize the principal relation, and it is for the breach of the protecting duty that a new liability is inflicted by way of sanction. The same remarks apply to a writ of *ne exeat*. Many other well-known illustrations are found in the field of equitable remedies; for example, bills *quia timet* and bills of peace. It is especially in the field of equity that ectophylactic rights prevail. A familiar illustration in the law field is anticipatory breach of contract. There is a protecting duty not to do acts which make ultimate performance impossible. The breach of that duty is the imposition of a duty to render compensation as for a breach of the principal relation. In this case, there is not an accelerated breach of the principal duty, but a present breach of the protecting relation. Logically, a judgment for damages should be taken only as security awaiting the day of performance of the principal duty, but the law prefers the simpler though fictional operation of accelerated breach of the principal duty.

6. **Declaratory judgment procedure.**—A wide field of ectophylactic rights has been opened up by the so-called declaratory judgment procedure, the principle of which is already familiar in various legal and equitable remedies.<sup>13</sup> The juristic novelty of that procedure lies precisely in the creation of new duties of a protective nature to supplement other principal duties. There is a duty not to begin (or to maintain) an unmeritorious action. The sanction of this duty is nullity of the procedural act.<sup>14</sup> It would be incomprehensible that free access to the courts should be restrained unless that restraint were directed against an abuse. The plaintiff is restrained from proceeding because he is doing or attempting what should not be done. The point is sometimes misunderstood or overlooked that the state never prohibits an act or commands one, where a contrary act is in motion, unless the contrary act is a wrong. The command to a defendant to desist from a nuisance does not in the slightest way differ from the command to a plaintiff, whatever the procedural form, to

<sup>13</sup> See *Borchard* "The Declaratory Judgment" (1918) Yale L. J., 28:1, 105.

<sup>14</sup> *Terry*, note 2, *supra*, 123; *Austin*, note 3, *supra*, 522.



desist from an unfounded law-suit. Juristically, a prohibitory injunction against a trespass or a nuisance is of the same nature as a command, in the form of a non-suit or a *nil capiat*, from prosecuting an unfounded claim.

The declaratory judgment procedure is only one step in advance of the ordinary judgment for the defendant. There is a duty by virtue of that procedure on every party to a legal transaction not to make an unfounded claim as to the legal effect of that transaction.<sup>15</sup> That duty is broken by one of the parties when a controversy arises on the legal effect of a transaction. The sanction of the duty is a repetitive official formulation of the old duty. There may be a further sanction in a duty to pay costs.

It is interesting to observe the complicated series of steps which follow a breach of a legally frangible relation to the last stage of economic repose. The reactions of nature are immediate and concrete. In the legal field, except in the sphere of self-help, reactions are either not immediate or not concrete. If, for example, there is a breach of duty to perform a promise, the first reaction often is, a new legal relation involving a duty to repair the consequences of the first breach. This new relation is infrangible and, if not evolved by performance, may be specifically enforced by an action. When the power to sue is exercised and carried to judgment, an officially formulated repetitive duty is substituted for the second duty. Upon failure to perform this latter duty in the form of a judgment, economic satisfaction, if possible, can be attained only by the application of a new sanction, the power of execution by a levy or attachment, leading in the normal case to a sale of property and a new duty in the executive officer to pay over the proceeds. As to the debtor, the breach of the primary sanctionable duty is followed by a series of sanctions in the form of new duties and liabilities.

7. **Sanctional duties.**—Three points may here be noticed. The sanctional duty to pay compensation for the breach of a duty was said to be infrangible. In that respect it is like a sealed debt at common law which in theory is not susceptible of breach, or is like a valid promise to convey land which may

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<sup>15</sup> For the scope of the declaratory judgment in modern law in the various countries, see *Borchard*, note 13, *supra*.

be specifically enforced. In these cases, however, there is an accompanying duty of a phylactic nature—the duty to perform aptly. The latter duty is frangible and it is for the breach of that duty that a sanction is imposed. If a duty is infrangible, it can not have a sanction, and since there is a sanction in these cases it can only be connected with some other form of duty which accompanies and protects the principal relation.

The next point to be noticed is that a sanction, in the sense of a state-imposed or state-authorized evil to a wrongdoer, may be in a form which only repeats the old duty. But to be effective as sanction it is not enough that it be merely repetitive. The nature of the sanction lies in the strengthening of the legal bond between the parties—all to the end that the basal relation between the parties may be normally evolved. This strengthening of the legal bond may be made effective by repetitional formulation of the duty in an official way, as in the case of a declaratory judgment, or it may be a substitutional form of duty accompanied by an added power relation, as in the case of a breach of duty followed by a new duty to render compensation for the breach, accompanied by a power of action.

The third point to be noticed is that when speaking of phylactic relations we are concerned only with those which are homomorphic—where there is a principal duty<sup>16</sup> which is accompanied by a protecting duty, and not cases where there is a duty accompanied by a power. For example, the claim to corporal integrity is accompanied by the duty not to *attempt* to commit a battery. These are phylactic relations and they are homomorphic. The breach of the latter duty creates a sanctional power of self-defense, and a new sanctional duty to pay compensation for the assault with an accompanying power of action. A breach of the principal relation creates a new sanctional duty to pay compensation and an accompanying power of action. We are concerned here with any form of sanction, but the point to be noticed is that a protecting duty is not a sanction.

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<sup>16</sup> To avoid the possibility of confusion, it may be stated at this point that endophylactic and ectophylactic relations are varieties of principal and accessory relations which in their turn are divisions of dependent relations. See "Jural Interrelations," chap. xii.

8. **Classification of sanctions.**—Summing up, sanctions consist of new duties and of powers (or the exercise of powers). Sanctions are *private* when they are executed by private force; they are *public* when executed by state force. Sanctions are *automatic* when they are imposed directly upon a breach of duty; they are *executive* when they result from an act of choice. Sanctions are *specific* when they involve particular duties or powers; they are *general* when they involve duties to pay or powers to proceed generally to realize a sum of money. Finally, sanctions are *intermediate* and *ultimate*.<sup>17</sup>

*Illustrations.* If a landowner ejects a trespasser, this is the exercise of a specific sanctional power; it is a private, executive, ultimate sanction. Where a sheriff sells goods at execution sale, this is a general sanctional power; it is a public, executive, ultimate sanction. Where a debtor makes default, the new duty to pay damages is a sanctional duty; it is an automatic, general, intermediate sanction. Where judgment is entered on the debt, the judgment is a new sanctional duty; it is a general, executive, intermediate sanction.

9. **The test of the judicial function.**—The activities of courts, as courts, in a strict sense, are reducible to the creation of duties and the creation of powers. Courts never act in an adjudicative capacity except where a legal relation has been violated. More specifically, *a court never acts as a court unless a duty has been infringed.*

Courts, like other organs of government must and do exercise other functions than those that give them their chief character and name. Courts in all countries have legislated (i. e., made legal rules) and continue to do so. The common law is almost entirely a product of the courts, and a large part of legislation has been converted into a judicial gloss. But the process of making new legal rules or of changing old rules is for the most part subsidiary to the settlement of controversies. The leading exception is where courts make rules of procedure.

10. **Administration of law and physical force.**—There is a

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<sup>17</sup> For a somewhat different classification of sanctions, see *Terry*, note 2, *supra*, 16.

large class of cases where it is supposed the state administers justice without the use of physical force. A typical instance is where a bill is filed by trustees asking for construction of a will or where an executor or a receiver petitions for leave to compromise a claim or to do some other act in the course of administration. Such situations compel us either to amend the statement that courts never act as courts except on the violation of duty, or in the alternative, to discover in them a violation of duty. If a will is construed by a court, the decree of the court amounts to a command; that is to say, a duty is imposed on the trustees to act in accordance with the decree. There does not seem to be any difficulty for this illustration in assuming that the decree is a sanctional duty based on a breach of a protecting duty not to controvert the legal relations created by the will.

If leave is granted to a receiver or to an executor to do an act in the course of administration, there is not in form at least any command to do the act or not to do it. If the receiver does the act, he is not responsible if the court had jurisdiction to authorize it. In substance, however, the legal effect of the order is either (1) to command the receiver to act or else (2) to impose a duty on creditors and others not to bring in question the act if and when done. The difficulty here is not in finding the actual or potential force of the state, but in discovering an antecedent breach of an endophylactic or ectophylactic relation. There are two juristic alternatives:

(1) It may be claimed that in these cases courts do not function as courts but as administrative agencies, or as legislative agencies enacting special legislation creating legal relations in specific persons, as where a legislative body grants a divorce or enacts a law legitimizing a particular person; or (2) it may be assumed that there has been breach of an ectophylactic (protecting) relation.

The second view may be maintained with some plausibility but the first is probably the easier to support and seems to us the correct one. Writs of error, of supersedeas, of certiorari, and of procedendo; decrees to perpetuate testimony, for testimony *de bene esse*, and of adoption; and orders governing the administra-



tion of executors, administrators, receivers, guardians, conservators, and trustees in bankruptcy—whether procedurally contentious in form or not—are administrative in substance.<sup>18</sup> They are not sanctional dispositions, and courts when acting in such instances do not exercise judicial functions in the strict sense. The same observation applies also to the concluding steps in such administrative proceedings—to settlements of accounts, discharges of receivers, executors, etc., and also to discharges in bankruptcy.<sup>19</sup> But this observation does not apply, for example, to decrees of foreclosure, of divorce, jactitation of marriage, or for the dissolution of partnership. These are abrogative declarations of a sanctional character based on precedent violations of duty. They are strictly judicial in character according to the proposed test.

*Grounds of judicial activity.* Excluding, therefore, all administrative functions of courts as in the proper sense non-judicial, and having in mind that legal relations may be accompanied by protecting relations, the activities of courts may be invoked in the following cases: (1) Before infringement of the principal relation; and (2) after infringement of the principal relation.

**11. Classes of remedies.**—From the standpoint of a harmonious and effective social life, the remedy involving the least amount of social friction is to be preferred where a remedy is necessary. The existence of law and the social instinct normally are in themselves a sufficient safeguard of social harmony, but when legal relations become discordant, a remedy is necessary and the one which is the least destructive to the social tissues is the one which effectively restates a duty in an official and authoritative form without any further present intervention. This is the declaratory remedy.

<sup>18</sup> It would perhaps be readily admitted by those who do not accept the test of judicial action proposed in this article, that the appointment of a receiver, etc., is a pure act of administration.

<sup>19</sup> To these examples may be added the numerous instances of prudential justice (*freiwillige Gerichtsbarkeit*), among the rest, declarations of death, of legitimacy, and of majority, authentication and registration of documents, issuance of patents, trade-marks, etc. See *Gareis* "Science of Law" 256 sq., 260 sq.; *Dorner* "Verfahren der freiwilligen Gerichtsbarkeit" in *Kohler-Holtzendorff* "Enzyklopädie" (1913) III, 407 sq.



(1) *The declaratory remedy*. The declaratory remedy may be invoked in two classes of cases: (1) Before breach of a principal relation; and (2) after breach of a principal relation.

The declaratory remedy when invoked *before* breach of an endophylactic (principal) relation has two forms: (1) *Repetitive*—restating in authoritative form the existence of a duty or power which has become the subject of controversy; and (2) *excluding*—negating in authoritative form the existence of an asserted legal relation (duty or power).<sup>20</sup>

The declaratory remedy when invoked *after* the breach of an endophylactic relation has two forms: (1) *Constitutive* and (2) *abrogative*.

*Illustrations*. Where a duty or power exists and the servus of the relation denies the existence of such duty or power, the denial of the existence of the duty or power is a breach of an ectophylactic relation. The endophylactic relation, however, remains unimpaired, and the court in the so-called declaratory judgment procedure enters a finding which repeats the duty or power. The legal relation which was uncertain and disputed is now judicially established. Where, on the other hand, a duty or power is asserted which in fact does not exist, the court will enter an exclusory finding which officially establishes the non-existence of the asserted legal relation. In the latter case the endophylactic relation is the duty not to sue on the asserted

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<sup>20</sup> The term 'declaratory' is used here in the wide, and, as it seems to us, proper, sense to include any judgment of the existence or non-existence of a legal relation or any judgment creating or dissolving a legal relation in whatever form, so long as that judgment is merely declaratory and does not formally include a present constraint. The effort to confine the term to one species of judicial declaration (the so-called declaratory judgment as commonly understood), if it prevails, will make it necessary to invent another term for the remaining declaratory remedies or else create the risk that the legal nature of this important group of remedies will be misunderstood. It may be suggested that the generic term should be permitted to stand for its generic purpose and that for the narrower function of declarations which precede the breach of principal (endophylactic) relations, the term prophylactic (or preventive) declaration be employed.

At this point, it may also be stated that the terms 'repetitive' and 'excluding' are generic terms as here used and are not intended to be substitutes for the terms 'affirmative' and 'negative' as applied to judicial declarations of legal relations. It is entirely proper to speak of affirmative or negative preventive declarations, but these terms can not be used in the wider sense, since there would be instant conflict with 'constitutive' and 'abrogative' declarations.

duty or the duty not to attempt to exercise the asserted power. There are, accordingly, two ectophylactic relations: (1) The duty not to make non-procedural assertion of the existence of the duty or power, and (2) the duty not to make declaratory procedural assertion of the duty or power.

An illustration of another type is interpleader in equity. In this case there is an admission of a duty but an expression of doubt as to which of two or more persons that duty is owing. As to the defendant to whom the complainant owes the duty, the decree is a repetitive declaration. As to the other defendants, it is an exclusory declaration. If the decree is based on a duty owing at the time of the bill, it is a repetitive declaration of a sanctional duty and the decree accordingly will take on a constitutive element by merging the sanctional duty into a judgment duty.

A decree reforming an instrument is based on the duty of voluntary reformation. It is, therefore, a breach of an endophylactic relation. The decree, accordingly, is a constitutive declaration. A decree declaring a trust is, likewise, a constitutive declaration.

Examples of abrogative declarations based on breaches of endophylactic relations are decrees of divorce and of dissolution of partnership. A decree removing a cloud is not, however, an abrogative declaration, but an excluding declaration based on breach of an ectophylactic relation. The ectophylactic duty is to release an apparent claim affecting title, accessory to the protection of ownership.

(2) *Coercive declaration of duty.* Next, in the order of preference from the standpoint of social welfare, to a simple declaration of the existence or non-existence of a legal relation, is the coercive declaration of a legal duty. Compulsory declaration has two forms: (1) Phylactic restraint; (2) phylactic compulsion.

The obvious illustration of phylactic restraint is a prohibitory injunction. The basis of this restraint is the breach of an ectophylactic duty in the form of a threat to infringe the principal or endophylactic duty.

The clear illustration of phylactic compulsion is the decree of specific performance.<sup>21</sup> In this case also there has been a breach

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<sup>21</sup> The term 'specific performance' has been appropriated in professional speech for this one variety of coercion. There are, however, juristically many varieties of specific enforcement. Phylactic restraint is specific enforcement of a required negative duty. In the field of compensatory

of an ectophylactic relation, i. e., the duty to perform aptly. In theory, the endophylactic duty is infrangible and it is always susceptible of enforcement, notwithstanding the refusal of the promissor to perform.

A much purer example of phylactic compulsion is the case of a threat to infringe an obligation cognizable in a court of equity. In this case, there is a breach of an entirely different ectophylactic relation. A court of equity in a proper case may fortify the duty of performance by an anticipatory decree commanding performance on the due date. The decree of *ne exeat* is a further example of the same kind. In that case, however, the ectophylactic duty is specifically enforced for the protection of the endophylactic duty. *Mandamus* is a further case of phylactic compulsion.

(3) *Restitution*. The above types exhaust all the cases of remedies which are declaratory (in the broad sense). The next procedural stage is where declaration in repetitive form is no longer availing because the discordance has gone beyond the applicability of a declaratory remedy. The next remedy, accordingly, in order of preference, is to restore the dominus of the relation to his former legal position. This possibility, when it exists, implies that the endophylactic relation has been infringed but that the corpus of that infringed relation may be restored without, however, nullifying the legal effect of the wrongdoing as against the wrongdoer.

This form of remedy, which may be termed restitution, is illustrated in various ways by *habeas corpus*, *replevin*, forcible detainer, *ejectment*, and, conditionally, by *detinue*.

(4) *Compensation*. The next stage beyond phylactic declaration in its various forms and beyond restitution is to provide the dominus of the relation with an equivalent for the harm which he has suffered measured in money. This is the compensatory remedy of damages. Compensatory remedy has six forms based

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remedies there are numerous examples of specific enforcement. The action of debt is one of specific enforcement: Cf. *Terry* note 2, *supra*, 126 (128); The Uniform Sales Act establishes specific enforcement of simple contract debts: § 63. Every frangible relation, as has been shown, evolves into an infrangible relation which is specifically enforced. *Mandamus* and other restorative remedies are in substance specific enforcement. Since, however, use of the term 'specific enforcement' in a wide sense would be confusing, we have chosen as a generic term, 'integral redress.'

on (a) the pecuniary loss or gain of the plaintiff and (b) the pecuniary gain or loss of the defendant. This remedy, therefore, may present the following variations: (1) Where the plaintiff's loss and the defendant's gain are equivalent; (2) where the damages are measured by the plaintiff's loss and where the defendant has received no pecuniary gain; (3) where the plaintiff has sustained no economic loss and the defendant has received an economic gain; (4) where neither plaintiff nor defendant has sustained or received pecuniary loss or gain; (5) where the plaintiff has received pecuniary gain and the defendant has suffered pecuniary loss; (6) where both plaintiff and defendant have received pecuniary gain.

We assume in each of these cases an infringement of duty. That being so, the plaintiff is entitled at least, in any one of these cases, to nominal damages. The bearing of these permutations lies in this, that they are instances where the question whether a duty has been infringed depends on the further question whether a pecuniary loss has been sustained. They may also have an importance for the determination of the question of what is remedial responsibility as distinguished from penal responsibility.<sup>22</sup> The distinction between remedial and penal responsibility often is of importance in the construction of statutes and in controversies involving rights of foreign incidence (so-called conflicting laws).

(5) *Punishment*. The last procedural stage in the order of preference is punishment. The term punishment is a narrower term than penalty. Penalty may or may not include punishment, but punishment can never include a purely compensatory or restorative remedy.

12. **Further classification.**—Remedies may be classified as penal and remedial, phylactic and non-phylactic, repetitive and non-repetitive, and as those which provide integral enforcement or protection of the endophylactic relation and those which

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<sup>22</sup> Cf. *Salmond "Jurisprudence"* (3rd ed.) 85 sq., 372 sq.



furnish substitutional redress. Adopting the last as a basis, remedies may be arranged into the following table:<sup>23</sup>

TABLE NO. I

*Table of Judicial Remedies*

Integral Redress	{	Restraint
		Compulsion
		Restitution
		Declaration
Substitutional Redress	{	Compensation
		Punishment

13. **Summary.**—The remedy of restraint is always *proleptic* (anticipatory). Restraint can only come before the act to be restrained. If the wrongful act has been accomplished, another form of remedy is necessary.

Compulsion, also, is *proleptic*. Restraint is coercion against the doing of an act, while compulsion is coercion requiring an act to be done. Compulsory coercion is used because an act which ought to be done is not done. If the act required is or has been done, no remedy is needed. Restraint and compulsion, therefore, are opposite forms of coercion; the one for prohibiting an act; the other for compelling an act.

Restitution is a remedy for restoring a person, whose legal rights have been infringed, to his original position.<sup>24</sup> This remedy is purely *analeptic* (curative). It can be employed only where there has been a deprivation of the substance or corpus of a legal right. The restitutive remedy restores the corpus of the right to the innocent party by coercive measures. In all the fore-

<sup>23</sup> A German classification of actions is: 1. *Anspruchsklagen*: (a) *Anfechtungs*; (b) *Kündigungs*; (c) *Rücktritts*; (d) *Aufrechnungs*; (e) *Leistungsklagen*; 2. *Feststellungsklagen*: (a) affirmative; (b) negative. See *Kohler* "Zivilprozess und Konkursrecht" in *Kohler-Holtzendorff* "Enzyklopädie" (1913) III, 308 sq. Cf. *Seuffert* "Kommentar zur Civilprozessordnung" (10th ed., Munich 1907) I, § 253, p. 361.

<sup>24</sup> The restitutive remedy is not to be confused with the Roman 'in integrum restitutio.' The latter remedy was purely declaratory in substance, while the restitutive remedy is coercive. Cf. *Savigny* "System des heutigen Römischen Rechts" VII, § 315 sq., p. 90 sq.



going remedies, the distinguishing mark is a specific coercive sanction. Some act is commanded or prohibited. The sanction is specific. That particular act must be done or omitted. In the case of phylactic restraint or of phylactic compulsion, the duty, to omit an act or to do it, is sanctioned by direct measures against the person of the defendant. In the case of restitution, there is a specific executive sanction, but no duty in the defendant to act or to refrain, except the duty not to interfere with the execution of the sanction. Restraint and compulsion require acts of the defendant. The restitutive remedy rests entirely on public executive initiative.

The declaratory remedy determines the existence or non-existence of a legal relation.<sup>25</sup> It does not involve any coercion except the coercion implied in the legal relation. In that respect it differs from the remedies of phylactic restraint, phylactic compulsion, and restitution, all of which are directly coercive, requiring acts to be done or omitted as parts of the execution of the remedy.<sup>26</sup>

*Declaratory redress.* Declaratory redress may be invoked in two cases: (1) After breach of an ectophylactic duty and prior to breach of an endophylactic duty; and (2) after breach of an endophylactic duty. In the first case, the declaratory remedy is proleptic or preventive (with reference to the endophylactic relation). In the second case, the remedy is analeptic (curative). Proleptic declarations may affirm the existence of legal relations; these are repetitive declarations. They may negate the existence of an asserted legal relation; these are exclusory declarations. Analeptic (curative) declarations may either constitute a legal relation or abrogate a legal relation.

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<sup>25</sup> For a discussion of declarations of fact, see *Borchard* note 13, *supra*, 43 sq.

<sup>26</sup> As has already been observed, the term 'declaratory' is ambiguous. It may mean the following: (1) Any judicial finding, order, or entry, whether directly coercive or not; (2) a judicial finding not directly in itself involving coercion; and (3) a judicial finding of a prophylactic nature. For reasons, already stated, the present writer uses the term in the second sense. In the first sense, all orders, findings, and entries of court (e. g., money judgments, administrative orders, etc.) are declaratory. In the third sense, the term is limited to the so-called declaratory judgment.

The declaratory form of redress may be shown by the following table:

TABLE NO. II

Declaratory Redress	{ Preventive	{ Repetitive
		{ Exclusory
	{ Curative	{ Constitutive
		{ Abrogative

*Integral and substitutional redress.* All the forms of remedy considered up to this point in the summary afford integral redress. The plaintiff is afforded protection of the identical legal relation which is asserted. Protection of this asserted legal relation is effected by restraint, compulsion, or declaration. Where, however, the complainant does not seek specific protection of an asserted legal relation, but requires a substitutional form of redress, then the sanction is general and takes the form of compensation or punishment.<sup>27</sup>

*Complex remedies.* Redress, especially in equity, is often complex. A decree may be declaratory in part; it may restrain an act in another part; it may compel an act by another part; and it may award compensation by another part. Finally, it may be noticed that redress may be afforded either by mesne or final process. Thus, where a writ of replevin issues upon complaint, affidavit, and bond, the chattel is restored to the plaintiff, and the final judgment is either declaratory of plaintiff's restored possession or for restitution to the defendant. Remedies, therefore, may be classified from the standpoint of the ultimate result of the entire proceeding or with reference to a particular step in a judicial proceeding. Thus, in the case of replevin, the remedy is restitutive from the standpoint of the whole proceeding, or declaratory from the standpoint of the final judgment if the plaintiff prevails, and compulsory if the defendant prevails.

<sup>27</sup> It may be observed that even though the relation adduced is infrangible, unless the defendant can obtain the enforcement of a specific legal relation, the remedy must be compensatory. Thus, in the action of debt, which on historical grounds is classified as a species of real action and which clothes an infrangible relation, the judgment in form is for money and satisfaction is made by payment of any money which equals the amount of the judgment. From the standpoint of redress a specialty debt does not differ from a simple promise.



## APPENDIX I

### THE HOHFELD SYSTEM OF FUNDAMENTAL LEGAL CONCEPTS <sup>1</sup>

*Hohfeld.* Wesley Newcomb Hohfeld, late professor of law in Yale University, was widely known among his professional colleagues as a successful teacher and a keen analyst of legal problems. Such attributes in fair measure are a necessary part of the equipment of those who conduct the rigorous schedule of the present-day law school. But Professor Hohfeld achieved fame in a field other than that of teaching. He lived to realize the unique distinction of seeing his system of jural concepts accepted as a body of official classroom doctrine at the institution of learning, where later a wretched fate struck him down in the midst of his constructive proposals and while he was still in the flower of his mental vigor. Had he lived yet a while, he would have seen his jural analysis carried to, and established at, another famous seat of legal scholarship by a generous and competent associate. He would have seen an important revision of a well-known text-book based upon it.<sup>2</sup> He would have found a recent case-book making tacit acknowledgment of the value of his system.<sup>3</sup> Likewise, he would have been gratified, as well he might, to discover his analysis accepted by various law teachers, as shown by miscellaneous writings in American law reviews of recent months.<sup>4</sup> Lastly, had he lived, he would have experienced the satisfaction of finding an interest in his ideas unequalled perhaps by any single contribution to legal science in America within the last twenty years.

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<sup>1</sup> [This discussion was first published in *Illinois Law Review* 15:24 (May 1920).]

<sup>2</sup> Prof. *Arihur L. Corbin's Anson "Contracts"* (3rd Am. ed.) Oxford U. Press, 1919.

<sup>3</sup> *Bigelow "Cases on Rights in Land Including Introduction to the Law of Real Property"* (St. Paul, 1919).

<sup>4</sup> See, especially, *Yale L. Jour.* Vol. 26, et seq.

In venturing to discuss the Hohfeld System, and at various points to urge serious objections to it, the present writer is tardily responding to a wish which Professor Hohfeld himself, about a year before his death, did him the honor to express, that he make a formal statement of his views. The writer need not say that these comments, the substance of which he had already, though crudely and ineffectually, attempted to convey to Professor Hohfeld, go with a sense of regret that they can not in their present form meet the eye of that acute thinker, who, notwithstanding sharp difference of opinion, would have been liberal enough not to interpret them as other than testimonials of professional and personal esteem. For the rest this discussion lies under no restraint, since the contribution attempted by Professor Hohfeld is important enough to be depersonalized.

First of all, Professor Hohfeld's celebrated table of jural relations must be reproduced.

	(1)	(2)	(3)	(4)
JURAL OPPOSITES	{ Right	Privilege	Power	Immunity
	{ No-right	Duty	Disability	Liability
JURAL CORRELATIVES	{ (1) Right	(2) Privilege	(3) Power	(4) Immunity
	{ Duty	No-right	Liability	Disability

*Merits of the Hohfeld System.* Among the merits of Professor Hohfeld's System<sup>5</sup> are the following:

1. It was the first attempt at a complete systematic arrangement of jural relations. A half-dozen or more Germans had already treated in a thorough way the dominant side of jural relations. The most complete of these attempts was that

<sup>5</sup> In making reference to Professor Hohfeld's system, we shall for convenience make use of and cite the pamphlet entitled "Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays," by Wesley Newcomb Hohfeld (New Haven, Yale U. Press, 1919) which contains the two principal expositions of his system together with an introduction by Prof. Walter Wheeler Cook, all reprinted from Yale Law Journal, Vols. 23:16 (*Hohfeld*, 1913); 26:710 (*Hohfeld*, 1917); 28:721 (*Cook*, 1919). [Professor Hohfeld's writings, including the essays discussed here, have been put together in one volume: "Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays" (Yale University Press, 1923).]



of Bierling,<sup>6</sup> but no writer in any country, prior to Hohfeld, had sought to give a systematic account, with suitable terminology, of the servient side of jural relations. Partial efforts to state the correlatives (the dominant and servient sides of jural relations) had been made by Terry<sup>7</sup> and Salmond;<sup>8</sup> but the table of opposites is altogether a novelty—whether useful or not we shall have occasion to examine.

2. It made manifest, as never before, the great complexity of jural threads found in concrete legal relationships. The usual method of legal operation and of legal thinking lies in the realm of molar physics, where often qualitative analysis instead is demanded. Without trenching on the medieval debate of nominalism and realism, it is clear enough that where words are lacking, ideas are usually wanting. Confusion of all jural relations under one undifferentiated idea, 'rights,' can not but result in inaccurate thinking, and, as likely as not, occasionally, in incorrect legal solutions. The chief attribute of scientific progress is greater clearness of distinction. In this the law has been the most backward of sciences, and it is really astonishing, when one stops to consider the fundamental importance of ultimate categories in legal reasoning that the insufficiency of our technical apparatus, in a scientific sense, had not long before impressed itself.

3. It made conspicuous the uniqueness (singleness) of jural relations as existing only between two persons, and never more than two persons.<sup>9</sup> The confusion which existed on this point was disastrous in cases of rights in personam involving correal or solidary obligations. Nothing in Hohfeld's System points more clearly to the sharpness of insight of Professor Hohfeld and his colleagues than this important and necessary distinction.

4. It gave to the concept 'liability' a new and useful exten-

<sup>6</sup> "Kritik der juristischen Grundbegriffe" (1877); "Juristische Prinzipienlehre" (1894-1917).

<sup>7</sup> "Leading Principles of Anglo-American Law" (1884). [This very valuable work is now out of print.]

<sup>8</sup> "Jurisprudence" (1902).

<sup>9</sup> Professor *Corbin* has especially emphasized this point: "Legal Analysis and Terminology" *Yale L. Jour.* 29:165.

sion, which includes advantage as well as detriment.<sup>10</sup> A certain "linguistic contamination" adheres to the term 'liability' which a layman might find difficult to remove, but in legal science this may readily be ignored.

*Demerits of the Hohfeld system.* We now pass to what we regard as the demerits of the system.

The table of jural 'opposites' (a) is in part inconsistent, and (b) it has little, if any, juristic utility.

(a) *It is inconsistent.* But what is an opposite? It is said "that when dealing with jural opposites we are looking at two different situations from the point of view of the *same person*."<sup>11</sup> So far, so good. But there is still a difficulty. In logic, *opposites* as distinguished from *contradictories* are the extreme terms of *quantity*. Thus  $+a$  is the opposite of  $-a$ . In the case of legal relations to have a claim to payment of \$100 would be the opposite of a duty in the same person to pay \$100. Yet we find in Professor Hohfeld's table that the 'opposite' of 'right' is not 'duty,' but 'no-right.' Now it is clear that 'right' and 'no-right' are not 'opposites'—at least not in the sense of logic—but are rather 'contradictories' (negatives).

The next enumeration of 'opposites' in Professor Hohfeld's table is 'privilege' and 'duty.' Here is a clear change of position, since on the basis of contradictories or negatives (i. e., the presence or absence of a *quality*) the negative of 'privilege' must be 'no-privilege' and not 'duty.' Professor Hohfeld's illustration at this point will be useful—

" \* \* \* whereas *X* has a *right* or *claim* that *Y*, the other man should stay off the land [of *X*], he himself [*X*] has the *privilege* of entering on the land; or, in equivalent words, *X*

<sup>10</sup> Professor *Corbin* has especially emphasized this point: "Legal Analysis and Terminology" Yale L. Jour., 29:169; cf. the remarks of Dean *Pound*, Int. J. Ethics 26:92 (97).

It may here be noted that while Prof. *Hohfeld* ("Fund. Concepts," p. 16) and Prof. *Cook* (id., p. 7) clearly employ 'power' with both an abrogative and a constitutive function, Prof. *Corbin* in a recent statement issued with collaboration of his associates, seems to limit 'power' to the function of creating "new legal relations" ("Legal Analysis and Terminology" Yale L. Jour. 29:168).

<sup>11</sup> "Fundamental Concepts," p. 10, n. 13.

does not have a duty to stay off. The privilege of entering is the NEGATION of a duty to stay off."<sup>12</sup>

The term 'privilege' is used here apparently in the sense of 'liberty,' a non-jural concept, as we think; but the true negative of 'liberty' is 'no-liberty,' just as the negative of 'right' is 'no-right.'

(a) The field of 'liberty,' so far as it is connectible with anything of jural consequence, is limited to the enjoyment of the things for which claims and powers exist. Liberty can not be predicated of claims and powers themselves since they denote another group of ideas. What 'liberty' can the holder have in a chose-in action? Yet there is a duty. It is clear that not every duty is the 'opposite' of a liberty, as any right 'in personam' suffices to demonstrate. It may be possible to speak loosely of a 'possessio iuris' of rights 'in personam' which are susceptible of continuing acts (e. g., the claim of an annuitant), but even in this case it is an awkward locution to say that the right-holder has the 'liberty of exercising his claim.' Moreover, a claim can not conceivably be exercised. (b) Again, the liberty of the owner of land to go on his land might stand 'opposite' a contractual duty in the same person not to stay off the land, but to go on it. (c) Furthermore, the liberty of an owner of land to go on his land might stand 'opposite' his equal liberty to stay off his own land. Liberty to stay off the land is just as much an 'opposite' of liberty to go on the land as is the duty to stay off. These illustrations are put to show that 'privilege' (liberty) and 'duty' are neither true opposites nor negatives, and that this division is wanting in logical coherence. The real negatives are 'privilege' (liberty) and 'no-privilege' (no-liberty).

The next category ('power'—'disability') seems unobjectionable from the standpoint, not of 'opposites,' but of 'negatives,' since 'disability' is simply another way of saying 'no-power.'

<sup>12</sup> Id., p. 39. Note the term 'negation' (not emphasized in the original). Prof. Corbin has substituted for 'privilege'—'duty,' the terms 'no-duty'—'duty': cf. note 29 post. While this substitution has the effect of making the table of 'opposites' consistent on the basis of contradiction, it may be objected, that 'privilege' in the sense of 'liberty' is not the same idea as 'no-duty' (cf. note 29, post).

Likewise, and for the same reason, the last category ('immunity'—'liability') is formally consistent, since 'liability' is only a final statement of the effect of 'no-immunity.' If there is 'no-immunity,' necessarily there must be 'liability.'<sup>13</sup>

Since the table is inconsistent in one term regarded by Professor Hohfeld as fundamental, it might be supposed that the learned author was dealing neither with 'opposites' nor with 'negatives' (contradictories), in the application of logic, but with a third term, 'contraries,' in the sense that a wrongful act is the contrary of a duty, or in the sense of the 'contrarius actus' of Roman law; but without prolonging the discussion at this point, a cursory examination of the table will show that this possibility is not borne out. Moreover, the scope of 'contraries' as applied to jural concepts is very limited.

(b) *It lacks juristic utility.* It has little, if any, juristic utility. Since jural relations must be completely isolated and identified, it is of no profit to know that 'no-right' is the negative of a 'right.' (a) One may have 'no-right' and yet occupy an important jural position. For example, he may have a jural power (e. g., power of appointment). The thing of importance is to isolate and identify the power, in the example given, and not to determine that a jural power is a 'no-right.' (b) Again, one might have a 'no-right' because of subjection to duty.

*Contradictories.* Professor Schiller has aptly said of contradictories.<sup>14</sup>

"The slightest reference to actual thinking \* \* \* shows that the doctrine [of contradictories] carries the use of logical figments beyond the limits of the tolerable. We never actually use such contradictories. It is not profitable to talk about the universe at large and to contrast a single aspect of it with all that remains. We always know enough about anything we are discussing not to leave its position as vague as that, and hence language does not form pairs of words in the form of '*A*' and '*not-A*.'"

<sup>13</sup> On the assumption, of course, of a jural relation, since, if no jural relation exists, the terms are meaningless; e. g., if *A* is not an owner of land, his position is one of 'no-immunity' without, however, being that of 'liability.'

<sup>14</sup> "Formal Logic" p. 30.

Contrasting a definite legal concept "with all that remains" is only a step from contrasting a quality outside the field of reference with something in the field of reference by application of the 'law of excluded middle.' Thus we might say that particular legal concepts are either colloidal or not colloidal, isosceral or not isosceral, ponderable or not ponderable, etc.

To have known Prof. Hohfeld is to understand the table of 'opposites' (contradictories). His type of mind was the thorough-going kind. If he met a fact, he did not stop to inquire if it had any exchangeable value. We do not quarrel with that mental attitude. On the contrary, we highly respect it, and we simply affirm that as to the table of 'opposites' (contradictories) we are unable to find any place where it may be usefully applied in concrete legal thinking. It is not improbable that Prof. Hohfeld in his reflection on the subject weighed the possibility of constructing still other tables, as, for example, a table of 'opposites' (logical sense), of 'contraries,' and perhaps even of 'differentials,' but since nothing of such additional tables was announced or suggested by him, it is very likely that he regarded the two tables published as a complete statement of fundamental jural ideas so far as concerns the problem of systematic arrangement.

If the fundamentum divisionis is 'opposites,' in the logical sense (i. e., extreme terms of quantity), so far as it is workable, we fare no better. That a right in this sense is the opposite of duty is a matter of accounting rather than of jurisprudence. If 'contraries' is taken as the basis of division, it will be found that its range of application is too limited for practicality in a systematic table.

Coming back, therefore, to the table considered as based on 'negatives' (contradictories), which is the only view which will avoid a complete breakdown, and not on 'opposites' or 'contraries,' we conclude that it has little, if any, importance, and that if it seems desirable to retain it, its partial inconsistency should be adjusted upon a logical foundation. Other objections to the terms 'privilege' and 'immunity,' as applied by Professor Hohfeld, are reserved.

*Other objections.* A number of other suggestions may be grouped.



Professor Hohfeld avoids definition as "always unsatisfactory, if not altogether useless."<sup>15</sup> His repugnance to definition was the lawyer's instinct long ago expressed by Iavolenus: "Omnis definitio in jure civili periculosa est; parum est enim, ut non subverti posset."<sup>16</sup>

He did not have in mind, it is fair to assume, the objections to formal definition raised by non-Euclidian geometry and by non-Aristotelian logic. It is pretty certain that spherical triangles, parallel lines which meet, and the four-dimensional space were not the restraining ideas of his refusal to provide a system of definitions; but it may be noted that the philosophers and logicians who argue for pluralistic definitions and relativity agree on the acceptance of provisional definitions as data without which the processes of judgment and inference can not proceed. But if Professor Hohfeld has declined to define his terms, assuredly he has made it necessary for others to attempt it, if they would have any hope of understanding his proposal.

*Correlatives.* When we come to the table of 'correlatives,' we are as unenlightened as to what is meant as when the table of 'opposites' was encountered. Here we believe half of his table will be found logically consistent. The exceptions are 'privilege'- 'no-right' and 'immunity'- 'disability.'

The concept 'correlative,' as used by Professor Hohfeld, is clearly intended as that derived in formal logic from 'absolute' and 'relative' terms. Correlatives are those objects or ideas of objects which are necessarily connected with other objects or ideas of objects; thus, 'father' is a relative term and 'son' is the correlative. As to this distinction, Mr. Schiller has remarked that it is "wise of formal logic not to enter into such questions as why the 'correlative' of 'son' should not be 'mother.'"<sup>17</sup> In the light of this objection, 'wrong' would be as much a correlative of 'right' as is 'duty.' But it is allowable for each science to construct its own definitions, and a slight amendment of the definition of formal logic will avoid objections which have been raised in the newer functional logic to this category of terms.

<sup>15</sup> *Id.*, p. 36.

<sup>16</sup> D. 50, 17, 202; de reg. iur.

<sup>17</sup> "Formal Logic" p. 28.

We may say, for the purpose of jurisprudence, that a correlative term is that of an idea which is necessarily connected, and is consistent, with another idea.

With this addition, we find no objection to 'right'—'duty' and 'power'—'liability' as correlatives. These combinations of correlatives are fairly well established. But again, so far, so good; for when these terms are inspected in detail, it will be found, unfortunately, that occasionally the meaning is obscured by inconsistent or double usage in the Hohfeld School.

A quotation taken from the more recent of Professor Hohfeld's essays<sup>18</sup> on this topic and which may be accepted as representing his maturest views, is as follows:

"Suppose \* \* \* that *A* is fee-simple owner of Blackacre. His 'legal interest' or property relating to the tangible object that we call *land* consists of a complex aggregate of rights (or claims), privileges, powers, and immunities. First, *A* has multital legal rights [rights in rem], or claims that *others*, respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties.

"Second, *A* has an indefinite number of legal PRIVILEGES of entering on the land, USING THE LAND, HARMING THE LAND, ETC., that is, within the limits fixed by law on grounds of social and economic policy, he has PRIVILEGES OF DOING ON OR TO THE LAND WHAT HE PLEASES; and CORRELATIVE to all such legal privileges are respective LEGAL NO-RIGHTS of other persons.

"Third, *A* has the LEGAL POWER TO ALIENATE HIS LEGAL INTEREST to another, i. e., to extinguish his complex aggregate of jural relations and create a new and similar aggregate in the other person; also the legal power to create a life estate in another and concurrently to CREATE A REVERSION IN HIMSELF; ALSO THE LEGAL POWER TO CREATE A PRIVILEGE OF ENTRANCE IN ANY OTHER PERSON BY GIVING 'LEAVE AND LICENSE'; and so on indefinitely. Correlative to all such legal powers are the legal liabilities in other persons—this meaning that the latter are subject *nolens volens* to the changes of jural relations involved in the exercise of *A's* powers.

"Fourth. *A* has an indefinite number of legal IMMUNITIES, USING THE TERM 'IMMUNITY' IN THE VERY SPECIFIC SENSE OF

<sup>18</sup> "Fundamental Concepts." p. 96. The italics are the author's; the small capitals for differentiation are the present writer's.

NON-LIABILITY, OR NON-SUBJECTION TO A POWER ON THE PART OF ANOTHER PERSON.<sup>19</sup> THUS *A* HAS THE IMMUNITY THAT NO ORDINARY PERSON CAN ALIENATE *A*'S LEGAL INTEREST OR AGGREGATE OF JURAL RELATIONS TO ANOTHER PERSON; the immunity that no ordinary person can extinguish *A*'s own privileges of using the land; the immunity that no ordinary person can extinguish *A*'s right that another person, *X*, shall not enter on the land, or, in other words, create in *X* a privilege of entering in the land. CORRELATIVE TO ALL THESE IMMUNITIES ARE THE RESPECTIVE LEGAL DISABILITIES OF OTHER PERSONS IN GENERAL."

The correlatives, 'right'-duty' and 'power'-liability,' are well-seasoned and they are not questioned. We have already pointed out that Professor Hohfeld has given the term 'liability' a wider meaning than that which prevailed, and this extension we regard as original and useful. Before passing to a discussion of the other two correlatives, some variations of usage may be pointed out.

*Variations in the use of terms.* Professor Hohfeld speaks of "the householder's *privilege* of ejecting the trespasser." This seems a confusion of liberty and power.<sup>20</sup> When one acts for himself without legal consequences, as by walking on his land, he exercises a *liberty*, but when the owner puts a trespasser off the land, it would seem that he exercises a *power*, i. e., he does something which is a *disadvantage to another*.<sup>21</sup>

A license is regarded as a "particular" kind of 'privilege' (liberty).<sup>22</sup> Surely there is a juristic difference between what one may do on his own land and what one may do, outside of an agency transaction, on the land of *another*. A license, therefore,

<sup>19</sup> Overlooking the more important function of 'immunity' in a jural relation; e. g., immunity from an illegal levy on exempt property.

<sup>20</sup> "Fundamental Concepts." pp. 33, 41, n. 39. In like manner, Prof. Cook speaks of the "privilege of self-defense": id., p. 6; see, also, Prof. Corbin "Legal Analysis" Yale L. Jour. 29:167-8.

<sup>21</sup> We have already pointed out that Prof. Corbin seems to limit 'power' to a constitutive function (see note 10 supra). Perhaps this accounts for the difficulty of applying the term 'power' in these cases. Whatever the explanation, the Hohfeld System would in no way need modification if 'power' were used in the double sense of abrogative as well as constitutive function. In such case, the person against whom the 'power' prevails is subject to a 'liability' and not a 'no-right' as the use of 'privilege' necessarily requires in the Hohfeld System.

<sup>22</sup> "Fundamental Concepts." p. 50.

is either a kind of power, or else it has not been provided for, since, as against the owner of the land, it can not be a liberty ('privilege') without doing violence to the ordinary meaning of the term 'liberty,' and, likewise, confusing the non-jural concept of 'liberty' with the jural concept of 'power.' The correct word happens to be 'privilege' but it is not the 'privilege' of the Hohfeld System.

A constable is said to have a "privilege" of killing dogs without collars.<sup>23</sup> This also is a power and not a mere liberty. Professor Cook says of privileged defamation that "the person publishing the same has a *privilege* to do so."<sup>24</sup> The present writer agrees that 'privilege' is the right word, both in lawyers' parlance and in jurisprudence, but submits it is the wrong word in the Hohfeld System, if 'privilege' means 'liberty,' unless 'power' and 'privilege' overlap, in which case it will become necessary to register another quite obvious objection.

Professor Cook also speaks of the 'privilege' against self-crimination,<sup>25</sup> and he seems also to say<sup>26</sup> that this 'privilege' is a 'right' *stricto sensu* and also an 'immunity.' The same observation above made may be here repeated so far as the capability against self-crimination is regarded as a 'privilege.'

These few illustrations may suffice to show either inconsistency in the use of the terms 'privilege' and 'power,' or, in the alternative, an apparent overlapping which needs explanation. We now pass to a brief consideration of the validity of the two groups of correlatives denominated 'privilege'-'no-right' and 'immunity'-'disability.'

*Absolute and relative terms.* 'Privilege,' in the sense of liberty, does not seem to be a relative term at all, but, on the contrary, an absolute term. There is no more of 'relation' in 'privilege' (liberty) than may be found in a steam engine or a table. True enough, the term 'correlative' is indefinite at best, but it is clear that the correlation, if any, of liberty in one person and the

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<sup>23</sup> *Id.*, p. 41, n. 39.

<sup>24</sup> *Id.*, p. 7.

<sup>25</sup> *Ibid.* See also Yale L. Jour. 28:387 (391).

<sup>26</sup> *Id.*, p. 7, n. 3.



non-existence of rights as to the content of it, in another, is juristically quite a different sort than that of 'claim' and 'duty.'

(a) Without attempting here a refinement of distinction which more properly falls to the expert logician, it is enough to point out that 'no-right' is not any more entitled to be considered *the* correlative of 'privilege' than is 'no-power.' (b) Again, the correlatives 'immunity'-'disability,' for the same reason and for an additional reason, are objectionable. The additional reason is that the correlation is not complete. The person under disability may lack legal power (which is the sense in which the term disability is used in the Hohfeld System,<sup>27</sup>) but may there not be a disability, also, because of the existence of duty?

*Negative legal-content terms.*—(a) *Immunity—disability.* Like the table of 'opposites,' the category of 'correlatives,' 'immunity'-'disability,' is a novelty. While it is logically incomplete, as it seems to us, in not including under disability the presence of duty as well as the absence of lawful power, it may be objected to for the more important reason that, as limited, it is juristically of no consequence.

'Immunity,' if it means anything at all of importance, is immunity from *something*; but, in Professor Hohfeld's System, an immunity is *an immunity from nothing*. One would hardly be considered immune in any practical sense from a disease which has no existence. Likewise, in the law, what does not exist is not worth consideration either by lawyers or jurists.

The category 'immunity'-'disability' is an empty one—it has absolutely no content. It may be conceded that in the administration of justice the question often may be, and is, litigated whether *A* has the power to divest the title of *B*. *A* either has such a power or he has not. If *A* has the power, we are not dealing with an immunity but with a liability—something real—a positive concept; but if *A* does not have the power, even though *A* asserts it, there are blanks on both sides. What, there-

<sup>27</sup> *Id.*, pp. 96-97; *Corbin* "Legal Analysis" Yale L. Jour. 29:170.

The difficulty of this table proceeds from the erroneous view expressed by Prof. *Cook* that "each concept must therefore as a matter of logic have a correlative": "Fund. Concepts." p. 10. This is not true in logic, nor is it true in jurisprudence.



fore, Professor Hohfeld means to say is that where there is a 'no-power' on one side, there is a correlation of 'no-liability' on the other. This way of stating the matter must, we think, disclose that one nothing opposed to another nothing can not be regarded either as juristic correlatives, or as having any juristic connection or utility. They do not express any jural relationship.

The term 'immunity' is well known to the law and we believe it can be usefully employed in a juristic sense, which is reasonably consistent with prevailing professional usage, and it seems to us unfortunate that an effort was not made to incorporate it in a juristic table where its actual fundamental operation would be disclosed. Nor do we deny that it may often be convenient to use a negative of terms to facilitate communication of ideas. What we deny is that the terms 'immunity'—'disability' are of fundamental juristic importance in the limited use made of 'immunity' in Professor Hohfeld's System or that they express in the meanings given any jural relationship.

(b) *Privilege-no-right*. If the category of supposed juristic correlatives, 'immunity'-'disability,' is a case of blanks on both sides, so will it be found also with the supposed juristic category of correlatives, 'privilege'-'no-right.' This category is another case of negatives with which the law is not concerned in any practical sense except to determine within the scope of litigation that it is not concerned, by merely adjudicating a negative.<sup>28</sup>

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<sup>28</sup> Professor Hohfeld showed his understanding of the objection without, however, changing his position: (see Yale L. Jour. 23:16, 42 n. 59; 27:66, 71 n. 12).

It may be observed that Prof. Hohfeld used the term 'privilege' to include a variety of meanings, as follows:

(1) The 'privilege' of X, the owner of land, to enter on his land: "Fund. Concepts." p. 39. This variation doubtless properly includes also the 'privilege' of *not* entering.

(2) The 'privilege' of a householder to eject a trespasser: "Fund. Concepts." p. 41, n. 39.

(3) The 'privilege' of uttering a libel (e. g., 'privileged communication'): "Fund. Concepts." p. 46.

(4) The 'privilege' against self-crimination: "Fund. Concepts." p. 46.

(5) The 'privilege' of entering on the land of another by 'license': "Fund. Concepts." p. 49.

"It has been assumed," Prof. Hohfeld said, "that the term 'privilege' is the most appropriate and satisfactory to designate the *mere negation of duty* [our italics]: "Fund. Concepts." p. 44.

The views of the present writer may be shortly stated:

If *A*, the owner of a cigar, smokes it in his study, he exercises a liberty, or, in the language of the Hohfeld System, a 'privilege.' No one has a claim against *A* that he shall not smoke the cigar. What is the possible juristic significance of the act? Does the law in any way undertake for the advantage of others to say that *A* shall, or shall not, smoke the cigar? Not at all. Then where is the juristic significance? Clearly there is no positive juristic content in the exercise of a liberty, and it is equally apparent that if the law attempted to mark out the content of every possible act of liberty, in criminal law or otherwise, it would break down with its own weight. It should be emphasized that nothing less than *every* act of liberty is in question, and that no acts are involved which are a breach either of public or private duty.

This category reduces to this: Where one has no right to, or claim upon, the act of another, the other may do as he pleases. *Ex nihilo, nihil fit*. The two categories last discussed are simply two kinds of negatives—the absence of power and the absence of right (claim), respectively. In neither case is there a correlative. Non-existence is the most absolute thing in the world, and incidentally it is perhaps one of the few logical absolutes.

But while 'no-right' and 'no-power' must be regarded as

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(a) The term 'privilege' in the sense of "no-duty" is not synonymous with the term 'privilege' in the sense of 'liberty,' i. e., absence of jural relations.

(b) The term 'privilege' as used by Prof. Hohfeld is a blending and confusion of jural and non-jural concepts. In the variations above set out there are three separable ideas—liberty, privilege, and power. A term of such extension is unworkable and will result in confusion in cases where refinement of discrimination is called for in legal operations.

A similar confusion of jural and non-jural relations is found in a recent book ("Les transformations générales du droit privé") by Professor Duguit of the University of Bordeaux (translated in part as one of the chapters of "Progress of Continental Law in the Nineteenth Century" (Cont. L. Hist. Ser., XI, chap. iii). Professor Duguit, who may be said to be one of the most extreme representatives of the newer 'functional' jurisprudence, interprets the modern trend of law as being toward 'objectivism,' which according to him means a progressive cutting down of 'subjective' (legal) rights. We have attempted to show elsewhere that what has been reduced is not 'rights' but 'liberties': Jour. Cr. L. and Criminol. 9:464 (469-470).

Failure of discrimination of these ideas is not always unimportant, as may be seen in *Kemp v. Division*, No. 241 (1912), 255 Ill. 213, 99 N. E. 389; cf. Ill. L. Rev. 7:320, 323; 8:126.

juristic negatives and as logical absolutes, yet in fairness to Professor Hohfeld's System it is necessary to consider these terms in the exact form in which they have been presented; since it may be possible, contrary to expectation, that an absolute term may be, if not relative in logic (which involves a contradiction), at least correlative, in jurisprudence. The question, therefore, may be formulated as follows: Is 'no-right' the correlative of a liberty ('privilege'), and is a 'no-power' (disability) the correlative of 'immunity'? In other words, are liberty ('privilege') and 'immunity' relative terms or are they absolute terms?

The term liberty ('privilege') is clearly an absolute term, in any practical sense. The term 'no-right' has no greater connection with liberty by way of correlation than have 'no-power' (disability), or 'no-duty,' or 'no-liability,' or 'power,' or 'duty,' or 'liability.' Professor Corbin's explanation of 'privilege' as another name for 'no-duty'<sup>29</sup> makes this still more evident. Here it is clear that 'no-duty' and 'no-right' are both mere negations and that as such they can not be in relation in any logical sense.

Likewise, the term 'immunity,' as used by Professor Hohfeld, is also absolute. It can not claim for its correlative 'no-power' (disability) to the exclusion of 'no-privilege' or 'no-right.' The correlation is purely verbal; it is not real. If *A* is the owner of land without outstanding rights or powers in others, he is not in his situation as owner, which gives him certain claims and powers against others, under any duty or liability to such others. There is no claim against him (e. g., to make a conveyance as holder of the legal estate in trust); nor has any person the power to divest his title. Clearly *A*'s situation is, as respects others, an absolute legal situation. As to his title, no act can be claimed from him nor any act projected against him. If *B*, a stranger to the title, should go through the form of making a conveyance of a fee simple right in *A*'s land, the act would be a legal nullity.

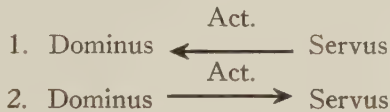
<sup>29</sup> "Legal Analysis," Yale L. Jour. 29:167-8. It is interesting to note that when 'no-duty' is substituted for privilege, not only is there a change of position (see note 12 ante), but the logical symmetry of the Hohfeld tables is adversely affected in this that a negative term is ranged alongside other terms intended in the Hohfeld System to be positive terms. Thus, it is necessary to speak of 'rights,' 'no-duties,' 'powers,' and 'immunities.'

Moreover, *B* is under no legal duty not to make such a paper conveyance. Any act of *B* attempting to convey *A*'s title would be wholly lacking in legal consequences. Accordingly, *A*'s situation, as owner, as to such an act on the part of *B*, is absolute; it has no connections or correlatives, and is lacking in juristic importance.

## APPENDIX II

### TERMINOLOGY AND CLASSIFICATION OF FUNDAMENTAL JURAL RELATIONS <sup>1</sup>

There are two, and only two, fundamental kinds of legal relation which may be illustrated by a diagram:



In the first case, an act *must* be performed by the servus of the relation for the dominus. In the second case, the dominus *can* perform an act against the servus.

A legal relation in the strict sense is constituted of three elements: (1) Two persons (a dominus and a servus); (2) an act; and (3) constraint aided by the law.

If any one of these elements is wanting, there can not be a legal relation in the strict sense.

A person can not be in legal relation to himself; a person can not be in legal relation to an object; an object can not be in legal relation to another object. Such situations involve relations, physiological, physical, chemical, etc.; but they are *anomic* (non-legal) relations.

A person may also be in relation to another person; but, if the relation does not involve an act, there is no legal relation. Thus, *A* and *B* are in geographical or spatial relation; but this relation also is *anomic*.

Even where two persons are found, and also an act which moves from one toward the other with constraint, the relation is still *anomic*, unless the constraint is aided by the law or has legal consequences. Thus, if *A* destroys the good will of the

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<sup>1</sup> An address delivered before the Association of American Law Schools.



business of *B* by lawful acts of competition, the acts and the relations are anomic. No legal consequences follow.

It should be noticed in this connection, that there are types of relation which involve persons, an act, and legal consequence. These are not legal relations in the strict sense, and yet they are so pervasive that they require to be labeled as a type of nomic (legal) relation. Thus, *A* has power to commit a tort against *B*; the exercise of this power has legal consequence; but it is a consequence not aided by the law for the benefit of the wrongdoer. This type of relation, which lies midway between anomic relations and strict-type legal relations, may conveniently be called a *mesonomic* relation. To complete the series, the strict-type legal relation may be called a *zygnomic* relation. There are, therefore, three kinds of relation: (1) Anomic; (2) mesonomic; (3) zygnomic.

Professor Hohfeld's method of constructing a table of legal relations was this: he saw that there are two kinds of cases (as already described)—one, where *D* could require an act *from* *S*; and another, where *D* could act *against* *S*.

These two cases may be illustrated:

- |          |   |           |
|----------|---|-----------|
| 1. Right | ← | Duty      |
| 2. Power | → | Liability |

Professor Hohfeld's specific contribution consisted in applying a negative to each one of these relations. The result is:

- |                             |   |                            |
|-----------------------------|---|----------------------------|
| 3. No-Right                 | ← | No-Duty<br>(Privilege)     |
| 4. No-Power<br>(Disability) | → | No-Liability<br>(Immunity) |

There are sound formal objections to the method adopted by Professor Hohfeld. They may be shortly stated:

1. A known relation can not be based on pure negation.

In order to have a relation of any sort, there must be affirmation or negation of a quality or function in an existent. To speak of "no-right" is to predicate the universe less only the idea of a

'right.' Likewise, to speak of "no-duty" is to assert the possibility of everything that exists except a 'duty.'

Wholesale, negative categories also have the unfortunate result of destroying positive categories already admitted. 'No-right,' as an unlimited negation, clearly includes a 'power'; and 'no-duty' clearly includes a 'liability.' In the same manner, 'no-power' includes a 'right'; and 'no-liability' includes a 'duty.' It follows, necessarily: (a) That the negative categories reduce to the positive categories (right-duty and power-liability); (b) that they include the positive categories and other undefined relations; or (c) that they include undefined relations other than right-duty and power-liability.

It will need to be noticed that Professor Hohfeld has in part substituted other terms for the general negatives.

'No-right' is not changed, but 'privilege' is substituted for 'no-duty.' In Professor Hohfeld's own words, "privilege" is used "to designate the mere negation of duty." But Professor Hohfeld also used the term 'privilege' in the sense of 'liberty,' without perceiving, I think, that 'no-duty' is a much broader concept than 'liberty.' If, as seems probable, the idea of 'liberty' is what is meant by 'privilege,' I can not see how it has any legal character.

For the terms 'no-power' and 'no-liability' Professor Hohfeld has substituted, respectively, the terms 'disability' and 'immunity.' Here he used 'immunity' in "the very specific sense of non-liability or non-subjection to a power on the part of another person." The situation, also, does not involve a legal relation.

The negative categories invented by Professor Hohfeld are set out, as has been seen, in correlative form. There is no doubt a verbal correlation, for such is the arrangement; but there is not necessarily a real correlation of general negatives. Real correlation may or may not exist, and the fact can not be determined until the general negatives are reduced to concrete terms.

2. Each science must be based on a positive content. Arithmetic deals with numbers, and not with no-numbers; botany with plants, and not with no-plants; petrology with rocks, and not with no-rocks; law with constraints, and not with no-constraints.

I agree with Professor Corbin in believing that "in determining what is the law (legal rule) in any given case, we are invariably interested in finding the answer to one question: What will our organized society, acting through its appointed agents, do?" But Professor Corbin asks: "Must a rule of law always be a societal command backed by force?" Here is the crux of the disagreement between Professor Corbin and myself. It would be disingenuous to avoid his question. I shall answer it at once by saying, Yes!

Legal relations are based on legal rules. If legal rules constrain, legal relations also constrain; if there is no constraint in a relation, it is not a legal relation in the strict sense. But it will be said, this begs the whole question. Do legal rules always constrain? My answer is that the concept of constraint is involved in every rule whether legal or not. What would be the meaning of a rule (a law) of physics, of logic, of morals, of fashion, etc., if certain effects were not regarded as constant, necessary, probable, expedient, or demanded?<sup>2</sup> The very idea of constancy, or of necessity, or of probability, or of expediency, or of demand, implicate, in varying degrees, the notion of compulsion or constraint. A legal rule that could be obeyed or not at will, without legal consequence, is unthinkable.

If *A* sues *B* upon a wholly fictitious demand, having in mind only the claim to be paid, that *A* asserts, is there a legal relation between *A* and *B* as to the act involved in the claim—i. e., to pay? Professor Corbin, I think, will say there is a legal relation, and he will call it a "no-right—no-duty" relation. I do not deny that there is a relation as to the act in question. It may be a moral relation, or whatnot; in any case, it is anomic. There is no legal constraint on *B* to perform the act. It can not, therefore, be a legal relation. But Professor Corbin will reply to this, that the situation discussed must be a legal relation, for the reason that it is one upon which we may predict what the agents of the state will do, when the claim is presented. The state will act; it will deny *A*'s claim. Therefore *A* and *B* are in legal relation.

I do not know whether this chain of reasoning is sufficient on

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<sup>2</sup> Cf. *Pearson* "Grammar of Science" chaps. iii, iv.

its face to show its fallacy. It may be supererogation to point it out. We must go back to what we have already stated; every science deals with existents, and not with non-existents; the law deals with constraints, and not with non-constraints. But where is the constraint in the rule of law which governs the making of a fictitious claim by *A* against *B*? It is not, clearly enough, in the undeniable 'no-duty' of *B*.

Must we, accordingly, admit that a legal rule can exist without a command or a constraint? Must we, then, not also admit that a legal relation can exist without constraint? Not at all! The situation under discussion involves at least two genuine legal relations, each true to type, and containing as a necessary element the idea of constraint.

In the first, *A* is under a duty to *B* not to bring action on an unfounded claim. The sanction of this duty is nullity of the action. In this lies the constraint on *A*.

In the second relation, the judge is under a procedural duty to act adversely on *A*'s claim, if and when it is presented. The sanction of this duty is nullity of the judgment. In this lies the constraint on the judge.

It is one of the curious by-products of Professor Hohfeld's system of legal relations that, contrary to what has ever before been asserted by any one for modern times, the law is a broader field than morals, and that it includes, not only all of morals, but also all of deportment, fashion, art, etc., and even a considerable part of physiology, physical science, economics, etc. This results from the fact that no-right and no-duty relations are broad enough to include all or important parts of many other fields of science, even when these negative relations are confined to possible acts of commission or omission.

In summary, the objections which it seems to me must be made to Professor Hohfeld's table of legal relations are: (1) That it confuses various kinds of nomic and anomic relations. (2) That the term 'privilege' has a multiple application: (a) It includes 'liberty,' which is anomic; (b) it is confusable with 'power'; (c) it weakens a valuable term ('privilege'), which should be confined to a single meaning. (3) That it leaves out of account, in a restricted use of the term 'immunity,' its most

important function. (4) That it is based on an incorrect point of departure, in so far as it is built up from general negations of positive relations.

I see no escape for myself or for others from these conclusions, but it must be acknowledged that Professor Hohfeld's tables of legal relations, considered with the articles in which they are presented, exhibit great industry, ingenuity, and, in the negative categories, originality. It is only right to say, also, that with some transposition, and a little reduction in the application of terms, Professor Hohfeld's table could be adjusted to the views expressed. In any event, there is a debt of gratitude due from all of us to the memory of Professor Hohfeld, and after him chiefly to Professor Corbin. They have done more to bring analytical jurisprudence to the forefront of academic discussion in America than any other agency since the day of Austin.



## APPENDIX III

### RIGHTS IN REM

On another occasion <sup>1</sup> the present writer undertook to state the precise and essential difference between relations 'in rem' and relations 'in personam.' The latter terms have been universally criticised <sup>2</sup> and they are always confusing especially to beginning law students when taken in connection with actions 'in rem' and actions 'in personam.' In a juristic sense, relations exist only between persons. There can not, therefore, be a jural relation between a person and a thing,<sup>3</sup> nor can there be a jural relation between things.

In the article to which reference has been made, a so-called right 'in rem' was defined as "*one of which the essential investitive facts do not serve directly to identify the person who owes the incident duty.*" Direct identification by the investitive fact by which the right is created, being taken as the basis of definition, a right 'in personam' was defined as one of which "*the essential investitive facts serve directly to identify the person who owes the incident duty.*" Since the terms 'in rem' and 'in personam' are unsatisfactory, we shall now substitute for them in this discussion, the equivalent terms *polarized* (for relations 'in personam') and *unpolarized* (for relations 'in rem').

Every legal relation, whether of claim, immunity, privilege, or

<sup>1</sup> "Rights in Rem," in Penn. L. Rev. 68:322.

<sup>2</sup> Cf. Salmond "Jurisprudence" (3rd ed.) 81, p. 205 sq.; Hohfeld "Fundamental Legal Conceptions" Yale L. Jour. 26:710 sq.; Holland "Jurisprudence" (11th ed.) 143; Markby "Elements of Law" (6th ed.) 165; Terry "Leading Principles of Anglo-American Law" 132; Hammond Introd. Sandars's Institutes of Justinian (Am. ed.) pp. Xli sq.; Schuster, "Leading Principles of Ger. Civ. Law," p. 67; Lindley "Study of Jur.," p. 57; Amos "Science of Law," p. 95; Pound "Introd. to Study of Law" (1912) p. 25; Vinogradoff "Common Sense in Law," p. 67.

<sup>3</sup> In continental juristic works, some writers define legal relation to include relations of persons to things (e. g., Enneccerus-Kipp-Wolff, "Lehrb. d. bürgerl. Rechts" I, 1, 155). Stammeler justly criticizes this usage ("Wirtschaft u. Recht," p. 658).

power, involves two persons. It also involves an advantage and a disadvantage; thus, *A* has a claim (advantage) of corporal integrity and *X* owes a duty (disadvantage) of negative acts toward *A*, the effect of which is to isolate the interest of *A* in his physical well-being and thus to leave it unimpaired as against conduct of *X*. Broadly, the two persons involved in the relation and the correlative sides, consisting of advantage and disadvantage, may be embraced by the term 'polarity.' Every legal relation in this sense has 'polarity.' It involves two persons (it is dyadic) and two aspects of conduct (it is dypolic).

A learned writer, Arthur L. Corbin, Professor of Law at Yale University, has criticized the analysis above summarized and has defended the terms "multital" (used for a relation 'in rem') and "paucital" (used for a relation 'in personam').

Professor Corbin says: <sup>4</sup>

" \* \* \* Hohfeld had suggested that 'A multital right, or claim (right in rem) is always one of a large class of fundamentally similar yet separate rights actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.' (Fundamental Legal Conceptions, 1917, Yale Law Journal, 26:710, 718.) " \* \* \* Kocourek criticized the definition as 'insufficient' and supposed the case where '*A*, a landowner, has granted an easement to every person in the state [and out of the state too] to walk across his land except to *B*.' *A*'s right that *B* shall not enter has now become a 'unital' right, although formerly it was one of many 'multital' [rights]. He [Kocourek] adds, 'Yet, there can be no doubt that this right is only a right in rem.' But there is doubt, because it depends solely upon one's chosen definition. If 'multital'-ness is the definitional attribute of right in rem, then this right against *B*, having lost this attribute, has become [a right] in personam.

"Professor Kocourek's definition seems to possess the very same weakness that he asserts against Hohfeld's definition, i. e., we can find at least one case where it does not work. Suppose that the investitive facts are such that we know that the duties correlative to *A*'s rights in rem are absolutely universal. Are not the persons bearing the duties directly identified by these investitive facts? \* \* \*

<sup>4</sup> "Jural Relations and Their Classification," Yale L. Jour. 30:226 (232 n. 4.)

"The fact is that there is no substantial difference between a right in rem in *A* against *B* and a right in personam in *A* against *B* \* \* \*."

There are two very striking features in Professor Corbin's explanation: (1) That a right in rem can be transformed into a right in personam, without any new jural fact which affects the integrity of the right in question; (2) that there is no substantial difference between a right in rem and a right in personam.<sup>5</sup>

Legal relations may be defined and classified from two standpoints: (1) According to their *internal*, substantial qualities; and (2) according to their *external*, accidental connection with other legal relations. At the threshold, it seems to us that Professor Corbin has confused these different points of attack, beginning with an effort to define legal relations according to their *internal* qualities and ending with a definition based on accidental, *external* contacts. The net result is that Professor Corbin has started to justify new words for old concepts and by the difficulties encountered in application of his terminology has unconsciously been catapulted into an alien cross-division where the old concepts are obliterated. It is understandable that by this method of analysis, Professor Corbin could assert the revolutionary doctrine that there is no substantial difference between a right 'in rem' and a right 'in personam.' But that view is not tenable on that ground or on any other.

The ideas which underlie relations in rem (unpolarized relations) and relations in personam (polarized relations) constitute one of the most pervasive, fundamental, and utilitarian categories of legal science. Without them we should be in the paleolithic age of jurisprudence. Hohfeld no doubt recognized the great juristic value of these concepts, for after his elaboration of the kinds of legal relations (claim, power, etc.<sup>6</sup>) he first began

<sup>5</sup> A similar view, though based on other grounds, has been expressed by a German jurist (*Neuner*, "Wesen u. Arten d. Privatrechtsverhältnisse," pp. 15, 40), but it has no following.

<sup>6</sup> Legal relations may be classified into a hierarchy of classes, orders, families, genera, and species. This has been done partially by Holland and by Salmond, but it can not be fully accomplished until the categories are more fully worked out.

in his attempt (interrupted by death) at further classification, with rights in rem. Conviction of the juristic importance of keeping intact the basal ideas of the categories under discussion must be our excuse for again taking up the cudgels.

It may be admitted that "multital"-ness is the normal external accompaniment of an unpolarized relation. It is insisted only that "multital"-ness is not an essential, *internal* quality of an unpolarized relation, since we have already shown that an unpolarized relation may exist in a unitary (dyadic) relation; i. e., in the case where a landowner has given an easement to cross his land to all persons but one (who may be known to him or not). The case put is one of progressive cutting down of the incidence of the relation, but a case may also be put where a relation in rem at the time of origin is not "multital." Thus, let it be supposed that every taxpayer and every member of his family has by law the privilege of crossing any open field, but that others may not. Let it be supposed that there is only one person who does not come within the privilege. That isolated individual may be known to the owner of the land or be unknown to him. It is immaterial. Here, also, therefore, is an instance of a right 'in rem' against a single person.

The internal character of an unpolarized relation does not change by reason of external jural facts. Once polarized, always polarized. Once unpolarized, always unpolarized.<sup>7</sup> We may admit, also, that the terms "multital" and "paucital" may stand as descriptive terms, if it seems desirable to any one to use them, but only on the clear concession that these terms 'are not substitutes for relations 'in rem' and relations 'in personam,' and on the further concession that they are loose-jointed cross-divisions; for how many is "multital" and how few is "paucital?" Do these terms depend on individual psychic temperament, or are they related to the census tables of a particular state? For an individual given to gross exaggeration, "paucital" is always "multital"; for one reserved and cautious in his utterances,

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<sup>7</sup> The question is entirely one of convenience and on that ground it is preferable to regard polarization as creating a new legal relation. For example, when a battery is committed, the new relation is polarized (i. e., duty to pay damages) but the unpolarized relation remains intact.

"multital" is likely to be "paucital." In a populous country like China with its four hundred millions of inhabitants, for a disciple of Mencius, a legal relation will need much incidence before it becomes multital; while in San Marino a tenancy in common as between co-tenants may be regarded as a complex of multital relations.

The illustration put by Professor Corbin, by way of a 'coup de la mort,' of an unpolarized relation of universal incidence as amounting to identification, seems to us to embody an apparent kind of fallacy. Let us put it this way: suppose a biologist has isolated under his microscope one of the animalcula known as 'rotifer vulgaris'; has he identified all the animal, vegetable, mineral, and other kingdoms, because of their universality of incidence? Clearly not, if identification means anything. There may be relations of universal incidence of disadvantage (duty or liability) but do we know anything else than that a *class* is pointed out? Does the investitive fact go far enough to point out directly even a class? We think Professor Corbin himself would be one of the first (by the good title of his own contribution to the point that legal relations are always relations of "*two persons, neither more nor less*"<sup>8</sup>) to insist that there can be no legal relation between one person and a *class* of persons. Suppose, even, where an unpolarized relation exists, that the name and personal character of each one of all the other persons in the world are known to the dominus of the relation before and after the relation comes into existence (e. g., where *A* becomes an owner of land)—does the investitive fact of his ownership (i. e., his power to accept an offer of grant) directly, i. e., in and of itself, point out these persons?

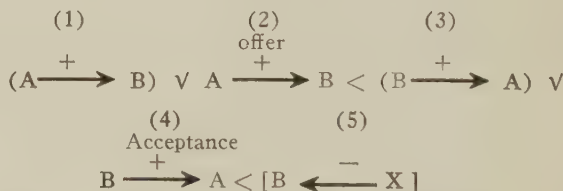
If we ignore the plain distinction between the meaning of the words 'direct' and 'indirect' we necessarily get into other difficulties. Suppose that *A* when exercising his power of acceptance of an offer of grant, knows the names and faces of twenty thousand persons, as we have heard a successful politician boast, would not the twenty thousand and one persons (we include the grantor) be more directly identified than the remainder of the men, women, and children of the orbis terrarum?

<sup>8</sup> "Legal Analysis and Terminology," Yale L. Jour. 29:165.



A more crucial case can be put: suppose that *A* becomes an owner of half of a tract of land under a grant from *B* who remains owner of the other half. *A* has a claim to lateral support of his land. Did *A*'s power to accept an offer of a grant of a specific half of a given tract of land directly point out *B* as lying under a duty not to dig on the half of the tract not conveyed, so near the border as to cause *A*'s land to fall into a pit? It seems to us that the answer is clearly that it did not. The investitive fact standing alone does not inform us whether *B* is the owner of the remaining half of the tract or not. The persons who owe the incident duties of not infringing the claim of lateral support are unpolarized—they include owners, tenants, licensees, and even trespassers of the other half of the land.<sup>9</sup> It would be otherwise if the grant from *B* to *A* was of an undivided half of a tract of land, so far as concerns the duties of co-tenants between themselves.

<sup>9</sup> The act of exercising a power to accept an offer of grant does not polarize the grantor. The juristic situation may be shown in the following diagram: (where parenthesis = mesonomic relation; square bracket = zygnomic relation; right arrows are powers; left arrow is claim; bracketed arrows = relation; plus arrows = positive acts; minus arrow = negative act (i. e., to refrain from trespass); unbracketed arrows = acts; < = involution (resulting in); ∨ = evolution of the proximate preventient relation; A and B = grantor and grantee; X = indeterminate person):



The jural act of acceptance (No. 4) is like a usucaption. Historically livery of seisin was the ceremonial to make evident that the grantee took the land, i. e., the possession (Black. Com. II, 310; *Pollock and Maitland*, Hist. Eng. Law, II, 29-80) and so basic and fundamental, historically and juristically, is this view of the nature of possession that until 1845 in England in legal theory (as modified, however, by the statute of uses) no deed of conveyance was effective until the grantee took possession (8, 9 Vict. c. 106, s. 2). The relation (No. 3) out of which the acceptance (No. 4) is evolved, is polarized; i. e., the (now) grantee has a power to accept, and the (now) grantor is under a liability that his offer (No. 2) may result in legal consequences: i. e., that he may lose the land to the grantee; but the fact remains that the act of acceptance (No.

Suppose, again, that *A* says to *B*: "I will pay you \$100 if you will promise to deliver to me the sorrel mare known as *V*," and *B* says: "I accept." In the various relations which may arise out of this bargain, the investitive fact always directly identifies the persons (buyer or seller) who owes the incident duty.

There is no difficulty about the matter if we do not inject into the problem unnecessary complications. Certain relations are polarized and the others are unpolarized. What is the explanation of this juristic phenomenon? Is it not simply this: that in unpolarized relations *there is no practical need of identification*, while in polarized relations we must know the polarity (i. e., the persons, the advantage, and the disadvantage) in order to deal with it in an intelligent and in a utilitarian way? If *A* has a claim (right) to reputation, is there any practical necessity of legally identifying a million persons each one of whom has the power to utter a defamatory statement? There might be some practical utility in *A*'s keeping a list of his enemies and cataloging

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4) does not *in and of itself* polarize the offerer any more than any other person in the world. The case is no different than if *A*, an owner of a chattel, abandons it, whereupon he (*A*) or any other person has the power of taking it. The act of acceptance, therefore, does not polarize a legal relation but results in an unpolarized relation (No. 5). In analyzing this situation, we have used the conventional terms, "offer" and "acceptance," but they are not to be understood here in the contract sense. Strictly the offer is to abandon the land in favor of the grantee. The acceptance is not, as in contract, of an offer, but of the land itself. What the grantee wants is not the grantor's *offer* (apart from covenants of title) but the land itself.

But, on the other hand, suppose that *A* commits a battery on *B*. Here the act of *A* (or, at any rate, its immediate consequences) polarizes *B*. In the case of seisin, the act is directed against a res (land) while in the battery, the act is directed against a person.

It is interesting to observe that polarization may come either from the dominus or the servus of the postvenient relation. Another illustration will show this in a striking way: Suppose *A*, *B*, and *C* are born in the order stated and let us take for our example *B*'s claim to corporal integrity. As against *A*, the investitive facts of *B*'s claim are essentially the existence of *A* plus the birth of *B*. As against *C*, the investitive facts of *B*'s claim are essentially the existence (birth) of *B* plus the birth of *C*. While, for the existence of any jural relation, a complex of jural facts is necessary to be taken into account, yet for the purpose of determining the nature of a legal relation as polarized or unpolarized, it seems more accurate to limit the determinative element to the proximate jural fact (act or event) which creates the relation.

the names of those likely to commit certain kinds of torts against him, but this procedure is entirely too practical for the law since it will not ordinarily entertain any presumption of future wrong-doing as to any person, whether friend or enemy.<sup>10</sup>

Suppose, again, a "multital" dependent relation where the servus is known to all persons but where the domini are unidentified; as, for example, when *A* engages in the business of common carrier, by reason of which fact he immediately comes under a multiplicity of duties to receive and carry goods which are offered to him for that purpose. In this case, we have not, as before, instant negative acts to deal with, but conditional positive acts; the condition being that one of these unidentified persons shall step out of his refuge of legal anonymity and make a legal tender of goods for transportation. There is no practical legal need of knowing who these various persons are until the moment that they tender goods for transportation. At that moment polarized legal relations come into existence. Since it appears that either the domini or the servi of plurinary relations may be unidentified by the investitive fact or facts which create them, we may speak of convergent unpolarized relations (in the dominus) and of divergent (from the servus) unpolarized relations.<sup>11</sup>

Inasmuch as practical necessity and utility are the base of the distinction, it will be found as a corollary that in all independent unpolarized relations the content of the relations (acts) is negative and that in nearly all polarized relations, whether dependent or independent, the content of these relations (acts) is positive. One exception is to be noted and accounted for. If *A* has agreed with *B* not to compete with him in business, the act required is a negative act (i. e., *not* to compete). The relation is polarized, but the practical significance and utility of identifying *A* as the person who owes the negative duty, lies in the fact that he is the only person in the world who is pre-

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<sup>10</sup> Mr. Terry in his analysis of rights seems to have gone this far: "Leading Principles of Anglo-American Law," 119.

<sup>11</sup> Thus, when there is a claim (right) of reputation in *A*, a multiplicity of legal duties *converge* toward *A*. Where *A* is an innkeeper, a multiplicity of conditional duties *diverge* from *A* in favor of indeterminate persons.

vented, because of his contract, from engaging in otherwise lawful acts of commercial rivalry.

In conclusion we believe we may assert with some confidence: (1) That the original distinction of relations 'in rem' and 'in personam' is of considerable juristic importance; (2) that the terms "multital" and "paucital" are not synonymous with, but are cross-divisions of, 'in rem' and 'in personam'; and (3) that the essence of 'in personam' and 'in rem' rests on the test of identification and that the old terms may be expressed by the substitutes here proposed, 'polarized' and 'unpolarized' relations.<sup>12</sup>

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<sup>12</sup> We use the term 'relations' because all the orders of legal relation, viz.: claims, immunities, privileges, and powers, may be polarized or unpolarized.





## APPENDIX IV

### NON-LEGAL-CONTENT RELATIONS

In an article entitled "Affirmative and Negative Legal Relations,"<sup>1</sup> Professor George W. Goble has carefully reviewed the law review literature of recent years on jural relations.<sup>2</sup> He accepts as sound the Hohfeld terminology and concludes that legal relations may exist not only in negative *form* but also in negative *content*. The supporting argument for the proposition is as ably and as forceably presented as the problem admits; it will no doubt have the immediate practical effect of fortifying the scientific peace of mind of many who had already accepted that view; and it will also serve to turn the scale for many others whose judgment on the juristic issue has been at poise. The present writer must, however, at the outset confess that he has not been convinced and that he continues to hold, perhaps obstinately, to the position that a so-called 'negative' (non-content) legal relation is not a legal relation at all. The reasons for this inertia will be briefly explained.

Professor Goble asserts that legal relations are of two classes: (1) Those which involve *constraint*, i. e., where the dominus can control the servus of the relation; (2) those which do *not* involve *constraint*, i. e., where the dominus can not control the servus of the relation. Professor Goble calls the first class, positive or affirmative legal relations, and the second, 'negative' legal relations. It is unquestionable that the quality contradicted by Professor Goble's 'negative relation' is not the term 'legal' but the term 'constraint.'

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<sup>1</sup> (1922) Ill. L. Quar. 4:94-106.

<sup>2</sup> The foundation article by Prof. *Wesley N. Hohfeld* is "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) Yale L. Jour. 23:16. For a list of other articles by Professor Hohfeld and by Professors Walter W. Cook, Arthur L. Corbin, Albert J. Harno, William H. Page, and W. L. Summers see the footnotes (esp. No. 1) of Professor Goble's article (note 1 ante).

The real issue is now before us. What proof has Professor Goble adduced that a 'negative' situation, such as *No-right—No-duty*, is a *legal* relation? Professor Goble has doubt whether constraint is an essential element of a legal relation,<sup>3</sup> but yet he is willing to admit, for provisional purposes, the validity of a definition which makes constraint an essential element of a legal relation. The learned author, by the provisional admission is now in this difficulty. *No-right—No-duty* is not a legal relation because the dominus of a *No-right* can not constrain with the support of the law the servus of the *No-duty*. He has sought an escape by saying: "If *A* sues *B* on an unfounded claim \* \* \* the law places constraint on *A* not to sue on such a claim and the sanction of the constraint is \* \* \* judgment \* \* \* against *A* for costs."\*

In this attempted explanation the author, we believe, has fallen into an error; an error not always easy to avoid. He has confused one relation with another. In the example just given, *A* is the dominus of the *No-right* relation, while as to the act restrained (action on a *No-right*) *B* is the dominus of the defensive relation. It is self-evident that *A* can not be the dominus of a relation in which *A* is also a servus.

There remains the speculative possibility that perhaps legal relations do *not* involve state constraint as an essential element of their nature. What is the proof of that? There is no proof. The assertion wipes out at one stroke every shred of distinction among legal rules, moral rules, rules of deportment, of health, of fashion, economics, and every other department of human conduct.

It is of course "a *legal* problem to determine into which of the two fields a given situation falls," but the existence of the

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<sup>3</sup> The law as an institution probably is not the direct result of physical force but rather is the product of a very complex combination of conscious and unconscious social impulses. The question of the *origin* of law, or the question of how the law as an institution is *maintained* is wholly irrelevant for the problem now under discussion. An answer to the question of how the law arises is unresponsive to the question concerning the nature of a legal rule. Any supposed rule which does not involve constraint in one form or another is not a rule. This is true not only for law but for any art or science whatsoever.

\* Goble, Ill. L. Quar. 4:94 (104-5).

*legal problem* does not prove that the situation dealt with is a legal relation. To say, because there is a legal problem, necessarily a *claimed* legal relation must be a legal relation is a non-sequitur. The court is called upon to say that *A* has no right of action against *B*. Does that prove that *A* stood in legal relation to *B* as to his (*A*'s) claim? Is the fallacy of an affirmative answer greater than if one would say, "plants are not animals, therefore plants are in the field of zoology because we have used the word plants in speaking of animals?" A botanist in his field researches may pick up a butterfly thinking it to be a highly colored leaf. After examination, he throws the butterfly aside. By the line of reasoning suggested, must we not conclude that butterflies are plants?

That *No*-rights are presented to courts for analysis is as inevitable as that lead, copper, bismuth, quartz, and shale find their way into an assayer's crucible. If the assayer is looking only for the precious metals, the fact that he must deal with lead, copper, and other substances does not show that the other substances are precious metals. The metallurgical operation or problem is one thing, but the substance dealt with in the operation or in the solution of the problem is another thing. There is no more reason to believe, therefore, that *No*-right—*No*-duty is a legal relation than for believing that copper is a precious metal, that a plant is an animal, or that butterflies belong to the field of botany.

But Professor Goble says: "If this relation (*No*-right) is not legal, approximately one-half of the matter found in law books is not law." We think this point is already answered by the work of the assayer of precious metals. Since precious metals are not commonly found unmixed with other substances, it is probably true that an assayer throws aside a greater quantity of material than he isolates. Like the courts, the assayer in given cases may not find any precious metals. But that does not make gold of iron pyrites.

It is true that law books contain a record of judicial experiments many of them purely negative in form and in content. Does that demonstrate a positive content from the standpoint of legal relation of such situations as *No*-right? We think not.

The only way a *No-right* ever comes before a court is in disguise. It is never presented as a *No-right*. If the state knew of any way of excluding a *No-right*, there can be no doubt it would exercise its power at the very threshold of litigation. But it will be said the state *does* act on *No-rights*. We doubt even that. We believe a court never (apart from language) acts on anything but legal relations, in its adjudicative capacity. Discussion of that point is not necessary here, and we let it pass. But what of the point that half of the law deals with so-called 'negative' relations?

Theoretically, all rules may be stated in a positive or a negative content. The requirements of a valid contract can be stated by a few dispositive facts. The conditions of fact which fall outside of these dispositive facts<sup>5</sup> may be stated in a million different varieties. If the law is made up of both the positive and so-called negative elements,<sup>6</sup> there would not be found paper enough in the world to codify or state the corpus juris of the most primitive system of law that has ever existed. The negative content instances which come before courts are recorded and they are discussed in commentaries. All this is useful and even necessary for understanding the positive content of law, but no further conclusion can be drawn from the fact—certainly not the conclusion that these negative situations are themselves legal relations.

From the standpoint of form, legal rules can be stated sometimes more conveniently in negatives than in positives. For example, the rule of law may be framed in this form: Do not commit murder. The positive elements of murder must, however, be stated somewhere in the law. It would not be feasible to state all the negative elements which do not constitute murder. It is not practically probable that such a negative approach could

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<sup>5</sup> Terry "Leading Principles of Anglo-American Law," p. 140 calls them *negative* dispositive facts. The same criticism which may be brought against *negative* legal relations lies against negative dispositive facts. The facts in question are positive but they lack dispositive effect. They are neither negative nor dispositive.

<sup>6</sup> The distinction already pointed out, must be kept sharply in view, between negation of verbal *form* and negation of *content*. In the context at this point, negation of *content* is what is meant.

ever completely succeed if it were attempted. In some cases, the rule of law may have what seems a pure negative form as where a singer is restrained from singing at a rival theatre, but here only the sanction is negative in form. Without pausing to analyze the form of legal rules or their sanctions, a topic full of complication, we may be permitted to instance one familiar example of the limitations of negation of form. Suppose an effort were made to give the boundaries of Illinois. These boundaries could be stated in negative form by stating that Illinois is the space bounded by Wisconsin, Iowa, Missouri, Kentucky and Indiana. But if one or more of these adjacent boundaries were unknown, the gaps could only be covered by information of a positive content; and even when the boundaries are determined by a method negative in form, it is, of course, clear that positive data of information make it possible.

The fundamental fact which we think has been overlooked is that every art and science must have a *positive* content. The law is made up of a complicated system of constraints. Law is no more constituted of no-constraints than botany is constituted of no-plants. If it be said that *No-right—No-duty* is a legal relation, we ask again what is the proof of it? Is there any evidence that the law at any point or for any purpose whatsoever functions on or with such a situation? It is only in a liberal sense that we can speak of such a situation even as a relation,<sup>7</sup> but in no accurate meaning can it be denominated a *legal* relation. If this is not true, we see no limits to be placed on the concept of legal relation. What is a legal relation? The test which seems to be advanced is that it is every assertion which is or may be procedurally advanced for a declaration or denial of right, or for an imposition of a sanction, or any other purpose within the scope of adjudicative action, whether well-founded or not. This is a liberal program which gives enormous breadth to the law, but where one person can claim nothing from another which the law under any circumstances will sup-

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<sup>7</sup> Cf. *Demos* "A Discussion of Certain Types of Negative Proposition" (Apr. 1917) *Mind*, No. 102, pp. 188 sq.; and the criticism by *Russell* "On Propositions: What They Are and How They Mean" (1919) *Arist. Soc. Supp.*, Vol. II, pp. 3-6.



port, we fail to discover what is gained in clearness of thought or precision in calling such a situation a legal relation. If it is a legal relation, what makes it a legal relation?

The present writer does not regard the question of the name to be applied to these non-legal-content situations as important. The necessities of language no doubt require us to say on occasion "No Right," "No Duty," "No Power," "No Liability," and also "No Immunity," "No Disability," "No Privilege," and "No Inability," but neither legal technic nor language requires us to denominate or to classify the various pairs as either correlatives<sup>8</sup> or as legal relations. Still, we see no harm in it if any legal technician finds his mental processes aided by such a construction. Our chief quarrel is not with that but rather with the use of terminology which permits one fundamental term to be used for three distinct and separable ideas.

What we seriously object to is the use of the term Privilege, in the sense of (1) Liberty; (2) Privilege (*stricto sensu*—capability to invade the legal sphere of another with the support of the law by a declinatory act)<sup>9</sup>; e. g., privilege of deviation, of self-defense, of libel; and (3) Power. The present writer has

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<sup>8</sup> The writer may be indulged a repetition here of his baby elephant illustration, hitherto unpublished, to show that there can be no certainty of correlation drawn from general negatives. Suppose a circus owner brings into a room a large and a small elephant, saying: "Ladies and Gentlemen, this larger elephant is the mother of the smaller elephant. According to the language of logicians the terms, Mother and Baby, are correlatives in the sense that there can not be a Mother elephant without a past, present, or future Baby elephant, and likewise there can not be a Baby elephant without a past, present or future Mother elephant. Now keeping in mind these necessary distinctions, I want to announce to you that in the closed room to the left is a No-Mother elephant and in the closed room to the right is a No-Baby elephant. Can any one here now tell me what is in the other rooms?" We have only to substitute No-Right for No-Mother elephant and No-Duty for No-Baby elephant to understand that no process of human reasoning will answer the question put by the circus owner.

<sup>9</sup> The legal situation where there is a privilege of self-defense or libel is not to be confused with a liberty. Self-defense involves two persons. It permits one person by self-help, with the support of the law, to invade the legal sphere of another. It is properly called a privilege because an invasion of another's legal sphere, if lawful, is a special advantage. It departs from the general rule. Liberty, on the other hand, involves, so long as it does not exceed the bounds of freedom, the exercise of one's will without reference to other persons. If an owner walks on his own

already attempted to show elsewhere<sup>10</sup> that the general meaning of Privilege is special advantage. If Liberty is what is meant, it is clearly a better word since it is well understood both by lawyers and laymen. The term Privilege as used by Professor Goble, Hohfeld (the originator of the term),<sup>11</sup> and others, seems to be synonymous with *No-duty*. This, however, can not be justified since *No-duty* (as a general negative) excludes *only* the idea of duty. It might therefore include Right or Power. The incoherence of the Hohfeld table is shown we think by this possibility since the negative terms have the inconvenient function of consuming the positive terms, Right-Duty and Power-Liability.

One more point may be noticed. Professor Goble in discussing the present writer's view of Liberty, says it is a legal compound of acting and omission. He puts this case<sup>12</sup>: "*O*, the owner of land can separate his 'liberty' into two parts and divest himself of one part and retain the other. He may make a contract with *S* in which he may assume a duty not to enter on his own land. The new duty destroys the old *Privilege* (Liberty) of *entering*, but it does not affect the other privilege (Liberty) of *staying off*." We do not agree at all with the conclusions stated. If *O*, an owner of land, has made a contract either to stay on or off his land, he has completely abstracted from his liberty as to the act required by the contract. If an owner is under a *duty* to stay off his own land how can it be said, if we are talking of law, that he has a *liberty* to stay off the land? This is simply a case of what has already been discussed, a change in form of the same positive element. Liberty is no more a compound than is duty. If one is under a duty to perform or omit an act, freedom of action is superseded. If we do not entirely misunderstand Professor Goble's point, it only

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land, the situation is clearly distinguishable from the case where one, using the highway, lawfully deviates onto the land of another, and thereby abstracts from the legal advantages of the land owner. In the Hohfeld terminology, there is only one word for the two cases. Both are called Privileges. Cf. *Goble* loc. cit., p. 103.

<sup>10</sup> See Appendix I.

<sup>11</sup> Basing his analysis probably on Mr. Terry's discussion of Permissive Rights: See "Leading Principles of Anglo-American Law," pp. 116-118.

<sup>12</sup> Ill. Law Quar. 4:94 (103, n. 16).

confirms our impression of the consuming and destructive character of the term Privilege. It shows that one may have a Privilege (*No-Duty*) and a Duty as to the same act which goes even a step farther than above suggested. In other words, Duty and *No-duty* are the same thing—a rather unusual result even for an unusual system of terminology.

## APPENDIX V

### NON-LEGAL-CONTENT RELATIONS: A REPLY

When an effort was made by the present writer about three years ago to make a critical survey of the tables of juristic terms constructed by the late Wesley N. Hohfeld, professor of law at the time of his death at Yale University, curiosity was expressed as to the procedure adopted by Professor Hohfeld.<sup>1</sup> While the results, if correct, could not be invalidated by a procedure however wrong, yet the results if incorrect, might be explained by discovering the method of operation.

Since that time the Hohfeld system has been the focus of wide interest and much debate.<sup>2</sup> The Yale Law Journal, a periodical of first rank and of nation-wide influence, for several years has been the militant juristic evangel of the Hohfeld gospel. This gospel has received the support of many legal scholars at New Haven and elsewhere. They have gone out into the world and preached it to every creature. Hohfeld, unfortunately, did not live to see the high tide of the stroke of his labor; neither did his proposal become a subject of debate in his lifetime.<sup>3</sup> Sit tibi terra levis. It must be acknowledged that if Emerson's formula for judging a country is reversed, in judging a juristic

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<sup>1</sup> "The Hohfeld System of Fundamental Legal Concepts." (1920) 15 Ill. L. Rev. 24.

<sup>2</sup> For the literature which has become extensive in bulk and item, see "Affirmative and Negative Legal Relations" by *George W. Goble* (1922) Ill. L. Quar. 4:49, n. 1; Comment (1922) Yale L. Jour. 32:157; n. 1; and the footnotes entered in the following articles: "Relations, Legal and Otherwise" by *Charles E. Clark* (1922) Ill. L. Quar. 5:26; "Negative Legal Relations Re-examined" by *George W. Goble* (1922) Ill. L. Quar. 5:36; "What is a Legal Relation?" by *Arthur L. Corbin* (1922) Ill. L. Quar. 5:50.

<sup>3</sup> This is not quite accurate, since as early as 1915 Dean Pound had already raised certain objections to some of Prof. Hohfeld's terms as lacking "independent jural significance." See Pound "Legal Rights," in *International Journal of Ethics* (Oct. 1915) 26: pp. 97-8. See *contra* Prof. *W. W. Cook* (Editor) "Fund. Legal Conceptions" (New Haven 1919) Intro. pp. 9-10.

theory, then the Hohfeld system probably is sound since the overwhelming numerical majority, so far as appears, of opinion approves it. That will suffice for most persons who have not the time or inclination to examine further into the matter, and that, too, will accord with a well-recognized canon of judicial persuasion. The detail of the controversy does not lead to a bower of roses or an Italian garden, but rather to an herbarium or a machine shop.

## I

Since the debate on the Hohfeld system commenced, the ground-plan of his construction has become apparent. It is exceedingly simple and can be illustrated by a homely example.

Let us take again the case of the assayer of the precious metals. He finds that not only do gold, silver, and platinum come into his crucible, but that he also must deal with such metals as mercury and palladium, which are so-called noble metals, and also with various other kinds of metals falling in other groups; for example, sodium, calcium, iron, antimony, to name only one each of groups different from those already mentioned. But there come to the assayer's crucible not only metals, but also all sorts of non-metallic rocks—sand rocks, clay rocks, carbonaceous rocks, etc. Since such is the nature of his work, the assayer now makes a survey of his work. It is to assay precious metals, but in discovering precious metals he comes into contact with nearly the whole field of petrology. Therefore, he classifies the assaying of precious metals as *dealing* with precious metals, and not precious metals.

This seems reasonable and as stated can hardly be denied. But what is *assaying* of the precious metals? Isn't it this?: the determination of the proportion of the specific precious metals in a given quantity of metallic ore or alloy? Does the assayer isolate the gravel, or does he isolate the gold? It may be answered, if he isolates one he isolates the other. True, if true. But suppose the metallic ore contains gold, iron, granite, quartz, lignite, and sandstone: what does the assayer isolate? Clearly, the gold.



It is not necessary to waste printer's type in making our point. The drift of it is apparent. No doubt an assayer of precious metals will be a better assayer though not necessarily a more skilful one if he is a thorough petrologist and geologist, but he may be a complete assayer if he has never seen a non-metal in his whole life. So, too, a judge, other things being equal, will be a better judge if he knows political economy and sociology, though he may be equally skilful if he knows only the sum total of state constraints.

According to Hohfeld, the law controls all human conduct—not simply that large part of it which is constrained, but also that larger field which is not constrained nor ever will be. The present writer has no objection to that view other than the one that it is not a true view. Sociology and law are no more equivalents than are rocks and precious metals. If any one can make anything out of the theory for the good of legal analysis, so far as it matters, we bestow our benediction. One writer, Professor Corbin, whose talents and insight, in other respects, we are compelled to admire, has carried so far the view that sociology and law are the same thing, as to refuse in his writings, so it would seem, to recognize the existence of the political state. There are no state (public) officers—only societal agents—according to Professor Corbin. There is no state; there is only society. It is, nevertheless, the fact that in litigation the plaintiff does not cry out to the people, but appeals to the constraint of the state.

The claim that law embraces the whole field of human conduct, whether constrained or not, might be set down as akin to a delusion of grandeur, harmless in itself so long as unasserted against the realities. If all the other sciences that deal with human conduct make similar claims of including certain special fields and all that lies beyond, the present writer is unwilling to join the syndicate which undertakes to underwrite the result. The reader may indulge his own speculations.

But the Hohfeldians have not stopped with mere assertion of what seems to us an inconvenient claim. They have invented categories which represent non-constraint relations, and they seriously urge that these non-constraint categories are useful

and even necessary for legal analysis. When Professor Hohfeld invented his juristic system, he found in use the then and now unquestioned juristic correlatives:

RIGHT: DUTY

POWER: LIABILITY

The sum and substance of his process was to insert the word No (or Not) before each of these four terms, for the creation of two new juristic categories. The result reads:

No-RIGHT: No-DUTY (Privilege).<sup>4</sup>

(Disability) NO-POWER: NO-LIABILITY (Immunity).

The recent discussion<sup>5</sup> continuing the earlier debate,<sup>6</sup> is valuable in at least two respects: (a) It establishes a formula for No-Duty (Privilege);<sup>7</sup> and (b) makes an admission which we think is fatal to the Hohfeld system.<sup>8</sup>

<sup>4</sup> In Prof. Hohfeld's original discussion of Privilege the meaning is sometimes Liberty, at other times No-Duty, and again No-Duty-Not-To. Apparently Prof. Hohfeld saw no distinction in these various forms.

<sup>5</sup> The three articles last mentioned in footnote 2 ante.

<sup>6</sup> "Affirmative and Negative Legal Relations" by *George W. Goble* (1922) *Ill. L. Quar.* 4:94; "Non-Legal-Content Relations" by *A. Kocourek* (1922) *Ill. L. Quar.* 4:233.

<sup>7</sup> The formula is Not-Duty-Not-To and is furnished by Prof. Clark (1922) *Ill. L. Quar.* 5:29. That formula is also accepted in effect by Prof. Goble (1922) *Ill. L. Quar.* 5:48. Whether that formula will meet the approval of other Hohfeldians does not yet appear. As recently as 1919 it was possible to debate with the Hohfeldians as a unit. In that year Prof. Corbin published what may be regarded as a constitution of Hohfeldianism in his article, "Legal Analysis and Terminology" in *Yale L. Jour.* 29:163. In that constitution he said (with the critical assistance of learned colleagues) that privilege is "the opposite of duty—it is another name for no-duty" (p. 168). Use of privilege in the sense of No-Duty narrowly escaped a juristic catastrophe due to the timely and forthputting interposition of Prof. Goble. (1922) *Ill. L. Quar.* 5:48.

<sup>8</sup> This admission is made by Prof. Clark (1922) *Ill. L. Quar.* 5:32, 33. Prof. Clark admits that Privilege is a "common idea" (i. e., a common denominator) for Liberty; Privilege (in the sense of special advantage), and Power. To the list may now also be added by the same admission, Duty (no-duty-not-to). The importance of the admission is this, that the Hohfeld table of four supposedly fundamental terms with four correlatives, contains one term that overlaps with two others in the same table and with one not in the table that belongs there (Privilege—strict sense) and with another that does not belong to a table of jural ideas (liberty). The table on the admission is logically out of balance in

Briefly summarized, the leading objections to the Hohfeld terminology as it stands in the light of its latest interpretation are:

1. Non-constraint relations are regarded as legal relations.
2. Inconsistently, non-constraint relations are regarded as involving constraint.<sup>9</sup>
3. The term Privilege (in the sense of No-Duty-Not-To) overlaps with Duty. For example, it is said a debtor has the *privilege* of paying his debt.
4. The term Privilege overlaps with Power. For example, it is said that a policeman has a privilege to kill a dog without a collar.<sup>10</sup>
5. The term Privilege overlaps with Liberty. For example, it is said that an owner of land has a privilege to walk on his own land.
6. The term Privilege as an overlapping term obscures the technical usage of Privilege, e. g., privilege of deviation.
7. The term Privilege as an overlapping term is put down in the same table with the terms overlapped.
8. Privilege in the sense of Liberty is not a jural concept. (See No. 1.)
9. Privilege in the sense of Liberty is not a relative term; i. e., it has no correlative.
10. Privilege in the sense of No-Duty-Not-To is ambiguous; there might be a duty to one person and not to another; further-

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combining a common term or synonym with basic terms. Prof. Clark's admission is both fatal and courageous.

The present writer is ready to admit and must admit, since it can not be controverted, that the content of one jural relation may be precisely the same as the content of another jural relation even with transposed *domini* or with different *domini*. An illustration of the latter is where *A* agrees with *B* to make a money performance to *C*. Assuming that *C* can sue for the performance in his own name, we have a case where the same performance is the content of two distinct legal relations.

We are also ready to admit that two or more basic juristic terms may have a common element. Thus Right is the common denominator of Claim, Immunity, Privilege, and Power (as the present writer prefers to use these terms). Again, Immunity and Privilege (same sense) have a common element described by Exemption. But it would be a logical error to construct a table reading: Claim, *Exemption*, Privilege, and Power. It will be useful to have a table of common denominators, but they must not be confused with basic terms.

<sup>9</sup> This is, or was, the hypothesis of Prof. Goble. Other Hohfeldians appear to dissent. Cf. Prof. Clark (1922) Ill. L. Quar. 5:31.

<sup>10</sup> Assuming that a dog may be owned and that the dog is not a *res nullius*, the act clearly is a power act. See Hohfeld "Fund. Legal Concepts." p. 41, n. 39.

more, an act might be unlawful without being invalid; it is uncertain how these instances are to be treated.

11. Privilege insofar as it overlaps with Duty, Liberty, and Power, is contrary to etymology and contrary to the dictionary meaning of Privilege as a special advantage.

12. Privilege destroys the useful word Liberty in lawyers' parlance. (See No. 5.)

13. Privilege destroys the same term (privilege) used in a technical sense. (See No. 6.)

14. Privilege in the sense of No-Duty-Not-To is oblique and no lawyer or judge would ever use it in *operative* legal analysis.

15. No-Right is not a correlative of No-Duty-Not-To.

16. No-Right is an undelimited negative; it can have no function except that of exclusion.

17. If No-Right has a correlative, it is impossible to state what that correlative is, since it negates only the term Right. (See No. 15.)

18. If No-Right is a correlative of No-Duty-Not-To, then when one has a privilege of performing a duty (see No. 3) Right and No-Right either coincide with different meanings for Right, or they contradict each other.

19. No-Right as it stands might be Duty, etc. (See No. 16.)

20. Disability in the sense of No-Power is subject to objections similar to those made to No-Right.

21. Immunity in the sense of No-Liability is subject to objections similar to those made to No-Right.

22. Immunity in the Hohfeld sense is an immunity from what does not exist; i. e., a no-power.

23. Contrariwise, the Hohfeldians do not recognize an immunity where it is needed; i. e., from a **wrong**.

24. Disability is a mere blank; it negates only power.

25. The Hohfeldians fail to use Disability to indicate the significant disablement of lawful power.

We need not add to this assignment of errors. Enough has been said to point out that the Hohfeld system is fatally defective in point of departure and in execution. The system is logically incoherent. It is not merely useless so far as it is original; it is destructive of the foundations of careful and accurate legal analysis.

If argument were necessary to establish the soundness of the charges of error pointed out—and for the bulk of them, we believe the mere specification of error should suffice—space is not now available. We shall, therefore, restrict our discussion to the first and second of the points enumerated.

## II

A. In another discussion the present writer attempted to impale Professor Goble on the horns of a dilemma. One of these horns turns out to be a stupid non-sequitur. The other horn, however, we believe serves its intended purpose. Professor Goble, contrary to the view of other Hohfeldians, believes that the relation No-Right—Privilege involves constraint. The present writer sees no reason to depart from the view already expressed. The point in dispute can be illustrated very quickly as follows:

1. *A* has no-claim against *B*; therefore, *B* owes *A* no-duty.
2. *A* owes *B* a duty not to sue *B* on the no-claim.
3. *A* has a power to sue *B* on the no-claim.
4. *B* has the power to nullify *A*'s action by pleading and proof.

As to proposition No. 1. Professor Goble is right in suggesting that there is no dominus. There is no legal relation here because there is no constraint on either side. In proposition No. 2, *B* is the dominus and *A* is the servus; there is constraint. In proposition No. 3, *A* is the dominus of the relation; *A* has a (simple) power to start an action against *B*. In proposition No. 4, *B* is the dominus; *B* can constrain the maintenance of *A*'s action.<sup>11</sup> Since *A* acted in violation of his duty in exercising his (simple) power to commence suit on an unmeritorious claim, the law at the instance of *B* constrains *A* and imposes the sanction of nullity on the action. The matter of costs is only additional sanction.<sup>12</sup>

<sup>11</sup> We choose the word 'maintenance' advisedly. *B* has no power to prevent the commencement of an action. In other words, he is liable to be sued even on a no-claim. But *B* has the power to bring the action to an end by constraining its maintenance, i. e., by preventing its further prosecution.

<sup>12</sup> The point is urged by Prof. Goble (1922) Ill. L. Quar. 5:41 sq., that since forbearance to sue on a good faith no-claim is regarded as valuable consideration, there can not be, therefore, a duty not to prosecute a no-claim. We do not think the conclusion follows. The distinction seems to us clear and we believe there is not, as suggested, a conflict of theory. A good faith no-claim may be a doubtful claim for economic purposes. A no-claim, of course, remains a no-claim whether asserted in good faith or not, but economically and practically its real character may be in doubt and dispute. Until its character is settled a no-claim, if asserted in good faith, is a 'spes actionis.' True, it may be a false spes, but spes it is, nevertheless. Is it not economically fair to balance a reasonable hope of recovery against a promise? If the parties think it



B. Professor Goble now passes to another point—that the courts are constantly announcing legal propositions that show the existence of non-legal-content relations. The inference which we are no doubt asked to draw is that the courts also act on and deal with non-legal content relations. We have not the slightest doubt of the existence of non-legal-content relations. We deny,

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fair, is there any legal rule that runs counter to their view of their own interests? There is not; so much is admitted. But the hope may be false. Why should not the party bear the burden if he puts the hope in motion? It is lawful to bring a tiger into a populous neighborhood. Contracts may be made for the transportation and care of such an animal, but the owner acts at peril, no matter how much care he may have used to avoid harm to others. If the acting at peril tort cases do not furnish a satisfactory analogy, perhaps a better one is found where money is paid under a mistake of law. Here also is a no-claim. The plaintiff would sue upon it at his peril, but yet payment received on such a claim can not be recovered, even though it is clearly not a gift transaction. We see no difficulty in finding consideration for a promise in a good faith no-claim consistently with the peril of action. A duty not to commit a wrong can not be a basis for consideration, but that seems to us a different proposition from an exchange of a reasonable hope of action for a promise. The form of a legal transaction also may change its legal substance. One can not build up consideration on a new promise not to violate an admitted duty, but there may be a novation of the duty which accomplishes the same result. Space is not available to discuss the cases. The whole apparatus of cases and law review articles is conveniently assembled in Prof. *Costigan's* "Casebook on Contracts" chap. iii, pp. 261-500.

From the juristic angle, the duty not to prosecute a no-claim is demonstrated by the sanction of nullity which is attached to the breach of that duty. That there is nullity, and that the nullity is a sanction can not be doubted. Its effect is to constrain the plaintiff of the no-claim from prosecuting further. Sanction does not mean necessarily decapitation, or imprisonment, or reparation, or restitution. Any form of constraint, however mild, may be a sanction. Where a prohibitory injunction is decreed the sanction is no more severe than where an action is stopped by a nil catiat. In that constraint lies the legal relation. We know of no instance where a course of conduct (i. e., course of acting) is constrained that does not necessarily imply a duty not to act. There would otherwise be no meaning to the constraint if it did not rest on a breach of duty. If no unlawful act, then why constraint? In view of the constitutional guaranty of access to the courts, if the guaranty means access to the courts on unfounded claims, it would need further examination to determine at precisely what point in litigation action on a no-claim amounts to a breach of duty; i. e., whether by suing out process, at the time of issue, etc. That there is a breach of duty is further evidenced by the judgment for costs which generally follows a procedural assertion of a no-claim. Clearly, such a judgment is a reparatory sanction, but there may be cases where a plaintiff recovers with a judgment against him for all the costs: *Didisheim v. London & Westminster Bank*, C. A. (1900) 2 Ch. 15.

however, categorically, that any court in any age or in any country has ever dealt with one or acted upon one in an adjudicative capacity. The law is a realistic institution. Its function is, as Romagnosi says, not advice but precept. It does not concern itself with what does not exist, or what can never exist; there must be at least a minimum of potential legal actuality. It has nothing to do with such obscurities as a no-claim or a no-power, and likewise the courts can not be put in motion by no-duties or no-liabilities. Professor Goble's intelligence is too alert to require to be warned against the inducements of judicial action or the language which accompanies judicial action.

Our concern plainly is with what the courts do in an adjudicative sense. Put in the simplest terms, does a court ever adjudicate any controversy without constraining a party to it? Is there or can there be any legal rule that does not govern conduct?<sup>13</sup> What possibly can be meant by a rule of any kind—and we do not restrict our question to law—whether of morals, mechanics, mathematics, matter—unless it involves conformity, direction, regulation, in other words, some element of constraint? How can there be a rule of law if it does not constrain anybody? How can there be a legal relation (and legal relations are the product of legal rules when accompanied by the necessary investitive facts) unless there is constraint of some one?

Of course, if the Hohfeldians desire to call dinner engagements consensual departmental legal relations there is no power to stop them. They are under no liability; in other words they are immune. This also must be classified because the Hohfeldians

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<sup>13</sup> There is a profuse juristic literature on legislative norms. Continental writers have gone through all the stages of discussion of the same question that is being opened up on this side of the Atlantic. It is not a 'res nova.' There, as here, permissive norms have been the storm center of debate. The European writers who have participated in this now fairly forgotten controversy are, among the rest, Thöl, Thon, Merkel, Binding, Schuppe, Bierling, Rosmini, Ramagnosi, Del Vecchio. It seems to be the settled view that while the law itself does not rest on physical coercion that all legal rules are essentially, directly or indirectly imperatives. As Del Vecchio puts it: "Although a command of prohibition does not appear in every maxim of law, and although many legal rules are permissive or declaratory, yet upon accurate analysis of any juridical proposition, there will always be found as a juridical residuum one or more independent or dependent imperatives": *Del Vecchio "Formal Bases of Law"* (Lisle's Trans.) p. 179.

'mirabile dictu' tell us it is another legal relation. Again we say, we see no objection to this sort of thing, any more, or for any different reason, than we should object if the botanist to whom we have already referred (in an earlier debate) who, on a botanical excursion, coming across a wandering mud turtle, should enter in his field book: 'chelonium testudinatum'; class Not-Plant Plant. We believe, however, no botanist ever does such a thing, and likewise we believe that no court ever does a comparable thing. It is insisted, nevertheless, that the courts lay down rules of law that do not constrain and that they recognize legal relationships that do not constrain.

C. Let us now examine the instances adduced by Professor Goble.

In *Chicago & Pacific R. Co. v. Stein*,<sup>14</sup> the plaintiff sued for an invasion of land by the erection of a bridge across a river. Plaintiff recovered a judgment.<sup>15</sup> Let us look to the action of the trial court. Professor Corbin has told us that in determining what law is, we are to observe what the state (he says, "society") does in adjudicating controversies. We agree that the test is a correct one. Now, what did the state acting through the trial court do? The court entered a judgment against the defendant which constrained the defendant to pay money. The rule of law for that judicial act was: Where one person invades the land of another he must pay damages unless there is a declared legal excuse.

But Professor Goble invites attention to the excuse asserted by the defendant and the court's action. There are two ways of looking at the matter. The rule may be phrased as above stated and there may be added to it: Neither power granted by the state to build a railroad nor permission granted by a municipality to build the bridge is an excuse. Another way of looking at the matter is to separate the general rule from all definitional, declaratory, limiting, or other rules, and to treat each as a separate legal rule.

Does the declaratory rule stating what is an excuse or what

<sup>14</sup> (1874) 75 Ill. 41.

<sup>15</sup> The judgment was reversed on appeal on the ground that the evidence of substantial damages was too conjectural.

is not an excuse constrain any person? That the affirmative declaration does (e. g., that ownership of land abutting on a non-navigable stream extends to the center of the stream), perhaps will be admitted. But the negative declaration that such and such an act or chain of events does not furnish an excuse—as to that Professor Goble says there is no constraint. Our answer is that (a) the negative is either a part of the complete statement of the rule, or (b) if the rule is to be taken as dismembered, the negative declaration at least constrains the judge of the court to apply it.<sup>16</sup>

The instant case shows how that constraint may be sanctioned. It was the duty of the trial court after verdict to grant a new trial because of unsatisfactory evidence to sustain a substantial verdict. The trial judge disobeyed that duty and the Supreme Court accordingly reversed the judgment. In other words, the Supreme Court imposed a sanction of nullity on the judgment of the trial court.

This explanation, if well founded, also disposes of *Goodenow v. Jones*.<sup>17</sup>

In bringing to a close this renewed discussion which chiefly attempts to reply to Professor Goble's ably formulated argument for non-legal-content relations,<sup>18</sup> the writer would do an injustice to any reader who has not followed the Hohfeld debate in all its phases, and who might perchance be convinced by what is urged here, if the impression were left that the Hohfeldians have

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<sup>16</sup> Mere language of a court not directly connected with a judicial act and which it serves to rationalize, may or may not be a statement of law. If a court in the course of an opinion should declare that when the sun crosses the plane of the earth's equator day and night are level, the proposition would be true, but yet it would not be a legal proposition even though a court stated it. We do not mean to suggest that any Hohfeldian would assert otherwise, even though the statement should be found in the syllabus of a judicial opinion, but we do mean to say that a rule of law must operate to constrain some class of persons without which it would not be a rule of law.

<sup>17</sup> (1874) 75 Ill. 48. In this case there was a duty owing by the plaintiff not to begin (or not to prosecute) an unfounded action. There was a duty owing by the judge of the court to constrain the plaintiff. Both duties were violated, and the Supreme Court reversed a judgment in plaintiff's favor. As already stated, sanction may also be by way of nullity. Cf. *Vinogradoff "Common Sense in Law"* pp. 28 sq.

<sup>18</sup> While it is a pleasure to confess the mental stimulus afforded by Prof. Goble's interesting dialectic, we believe it will be confusing to some

not in other respects rendered an important service to legal science. The contrary is the fact. But as to the question here under discussion we see no room for choice. Friendly feeling for one's colleagues or admiration of their talents will not make water run up hill. Neither will it bring into existence legal rules that nobody is bound to obey nor legal relations that do not constrain.

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readers to identify, as Prof. Goble does, negative legal relations with non-legal content relations. Even a negative legal relation may be negative in form or negative in content. If, as Prof. Goble urges, negative legal relations may also exist without constraint, then there is a third group. Our position is that non-legal-content relations are not legal relations of any sort, positive or negative. They may be positive or negative, but since there is no constraint, they are not legal relations.



## APPENDIX VI

### JURISTIC KNOTS AND NOTS:

#### A RECONSIDERATION OF JURISTIC TERMINOLOGY

The symposium on juristic terminology by Professors Clark, Goble, and Corbin is interesting and valuable.<sup>1</sup> It serves to point out certain features of agreement and to accentuate certain other features of disagreement as between those who accept and those who reject the Hohfeld tables. The debate on the Hohfeld System is fundamentally one of formal logic and Professor Goble has very aptly and justly spoken of the problems in issue as a "fascinating subject."<sup>2</sup>

Some of these problems may be restated.

1. What is a legal relation? The Hohfeldians do not furnish an answer.<sup>3</sup> The man who formulates a definition is said to put the world at a disadvantage. If anything has to break when the definition is encountered, the definition stands, regardless of

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<sup>1</sup> "Relations, Legal and Otherwise" by Professor *Charles E. Clark* (1922) Ill. L. Quar. 5:26; "Negative Legal Relations Re-Examined" by Prof. *George W. Goble* (1922) Ill. L. Quar. 5:36; "What Is a Legal Relation?" by *Arthur L. Corbin* (1922) Ill. L. Quar. 5:50. These papers continue the discussion of the following articles: "Affirmative and Negative Legal Relations" by Prof. *George W. Goble* (1922) Ill. L. Quar. 4:94; "Non-Legal-Content Relations" by *A. Kocourek* (1922) Ill. L. Quar. 4:233; see page 393, *supra*.

For references to other articles and debates and Prof. Hohfeld's Table of Jural Correlatives see footnote 20 *post*.

<sup>2</sup> *Goble* "Negative Legal Relations Re-Examined" Ill. L. Quar. (1922) 5:36.

<sup>3</sup> Professor *Hohfeld* said: "Attempts at formal definition are always unsatisfactory, if not altogether useless": "Fundamental Legal Conceptions" (New Haven 1919) p. 26. Definition may be difficult, but there is no greater aid than definition for precise thinking. The very fact that Prof. Hohfeld disregarded definition accounts for many of the difficulties encountered in an effort to understand his terms. His first essay in which the quoted words appear, was published in 1913 (Yale L. Jour. 23:16) and after the lapse of more than ten years there is no absolute certainty yet that his concept, Privilege, is correctly understood.

the result. But a proper definition does not and should not require a sacrifice of the realities—at any rate it should square substantially as a conceptual formula with the phenomena which it seeks to describe.<sup>4</sup> But the man who refuses to furnish a definition or to recognize one has the world at a greater disadvantage; it is next to impossible to demonstrate his errors.

2. Do rules of law expressed in negative form implicate constraint? The Hohfeldians say "No" to this. The opposing view is that every rule involves constraint. The form of the rule is immaterial. The rule may be phrased: "Hearsay evidence is not competent evidence." Another way of phrasing the rule is: "Hearsay evidence shall not be admitted." Upon whom is the constraint? Clearly, on parties and on judges. If the rule is phrased: "A partnership is not liable for individual debts" is there constraint? Again, clearly, yes. There is a duty not to make procedural assertion of such claim. The sanction of the duty is nullity of action. There is constraint also on the judge to observe the rule. It is his duty to observe it, and the sanction of the duty is nullity of the judicial act when the judicial act is reviewed.<sup>5</sup>

3. Does the law deal with non-constraint (non-legal-content) relations? The Hohfeldians answer in the affirmative. The opposition counters with an emphatic denial. If a plaintiff presents to a court an unfounded claim what does the court do? The Hohfeldians say the court seizes the claim and pronounces that it is a no-claim. The opposition says that as soon as the court discovers the nature of the claim it *constrains the plaintiff* from proceeding further. It does not deal with the no-claim;

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<sup>4</sup> The generally accepted view that possession is constituted of the elements of animus and corpus is a classical illustration of what may happen in a large and important field of law where a conceptual formula does not square substantially with the facts. The result has been an overgrowth of constructive possession and a tangled mass of arbitrary rules impossible to master or to rationalize.

<sup>5</sup> Laying aside the fiction of the declaratory theory of precedent, it will always be found that when a rule of law comes into existence or is applied, its coming into existence or its application is accompanied by constraint of some person. When a rule ceases to constrain it also ceases to be a rule.

it can not deal with a no-claim; a no-claim has no existence for any legal purpose; and the court acts upon the violation of duty in asserting a no-claim and imposes a sanction of nullity on the action. The difference of view on this point is not merely one of words; it is fundamental and goes to the root of the Hohfeld theory. The Hohfeld theory assumes that such an ethereal blank as a No-Liability-and-Never-Can-Be is one of the parts of a legal relation having the qualities of the most perdurable and resistant legal materiality.

4. Are the Hohfeld terms reduced to the "lowest common denominators?"<sup>6</sup> Are the terms ultimate? It is not so clear that there is a difference of view on this question. The opposition camp asserts that the term Privilege is a compound term.<sup>7</sup> Claim, Duty, Power, and Liability are ultimate juristic terms. The present writer has asserted and he deliberately repeats the statement that the Hohfeldian Privilege may include Liberty, Privilege (as a form of Power), Power, and Duty. We do not recall any published statement where this assertion has been denied except a cautiously phrased sentence in the recent article by Professor Corbin. We find, on the contrary, Professor Goble in a recent article expressly approving the Hohfeldian Privilege because it is "much more inclusive and comprehensive" than the meaning the present writer would assign to that term. The need of ultimateness and uniqueness is here entirely disregarded as if it were a merit.

When Professor Hohfeld invented his tables of juristic categories consisting of four pairs of correlatives, he sought to avoid the prevalent usage which permitted the term Right to be used

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<sup>6</sup> These are Prof. Hohfeld's own words: "Fund. Legal Concepts." p. 64. It is clear, however, that Prof. Hohfeld aimed at something more than common similarity. The word Right as a capability of exerting constraint on the servus of a legal relation is an excellent common denominator, but it is divisible into other more ultimate concepts. A common denominator is precisely the negation of the ultimate by its own terms. In contrast with the idea of generalization we find Prof. Hohfeld's essay entitled "Fundamental Legal Conceptions."

<sup>7</sup> Professor Clark admits the criticism. This admission we confidently assert is fatally destructive of the Hohfeld system as one of fundamental (ultimate) legal concepts. See the significant paragraph in Prof. Clark's article: "Relations, Legal and Otherwise" (1922) Ill. L. Quar. 5:32, 33.

in the sense of Claim, Immunity, Privilege, and Power. We now find, while the term Right was confined by Hohfeld to one ultimate use, that he used another term, Privilege, in a sense which has nearly all the objections of the multiple use of Right, and that what Privilege lacks in competing in disadvantage of plurality of application, it more than makes up in a strain on etymology and a conflict with common understanding. A table of juristic categories containing four terms with four correlations can not be accepted as *fundamental* if one of the four terms overlaps with three others and has a fourth additional application. If there is to be further debate on the Hohfeld terminology the serious charge made and here repeated must be admitted or refuted. If it is admitted, we think it necessarily must follow that the Hohfeld system must definitely be abandoned so far as it is advanced as a system of *fundamental* or *ultimate* legal concepts.

## I

The term Privilege is derived from *privus* (single, particular, peculiar, one's own) and *lex* (law). The common note that runs through the dictionary applications is "a benefit beyond the common advantages"; "an exemption from a burden"; "a special right."<sup>8</sup> It is correct to speak of a "privilege of deviation" or of a "privilege of libel," because these and similar cases are forms of exemption; they are peculiar advantages which, while open to all persons in like circumstances, are exceptional in their occurrence. Privileges in the proper sense are simply forms of power. They are exceptional kinds of power. There can be no hard and fast rule to determine whether a given capability should be called a power or a privilege and, moreover, it is quite immaterial since the basic juristic idea is power.

But the use of Privilege for Duty or for Liberty is wholly inadmissible. Where a principal is under a duty to perform a promise made by an agent who has disobeyed an express order

<sup>8</sup> Century Dictionary s. v. "Privilege"; Freund "Wörterbuch der Lateinischen Sprache" s. v. "Privilegium."

of his principal but has yet acted within his power (i. e., the apparent scope of his authority), it is a quaint use of words which has it that the principal has the *privilege* of performing the duty which is cast upon him by a rule of law where he vigorously seeks to avoid the obligation. The Hohfeldians say the principal has a *privilege* to pay, but the unfortunate principal will not the less regard it as a 'damnosa hereditas.'

There is no excuse for this abuse of our language. There is no need of slaughtering the ancient and thoroughly domesticated word Liberty. Professor Hohfeld knew very well the juristic nature of a 'privilegium.' There was absolutely no need for such a word in a variety of senses which included Liberty and Duty. There was no lack of suitable words for what the Hohfeld Privilege embraces. It was not a case of a nameless idea or a newly discovered function. The attempted extension of meaning is at once gratuitous and harmful. If Professor Hohfeld had adhered to the etymological sense which he understood as well as any other man, and which against his better judgment he strove to supplant for the sake of filling up a blank in his table, he might have reached the right solution, but, unfortunately, he was carried off his juristic feet by the negative categories which are substantially valueless in substance and faulty in application.

While it is clear that Professor Hohfeld had courageously decided to throw etymology and common consent overboard, it has not heretofore been easy to discover what invariable meaning was to be attached to the term Privilege. There seemed to be four possibilities:

(1) *Liberty*. Liberty means a capability of choice; it is actualized in Freedom. From a legal viewpoint, Liberty is wanting in polarity; it is one-sided. If I walk on my own land or write on my own paper, my act does not concern any other person in a legal sense, provided only that I do not infringe on the orbit of personality of another. Liberty, therefore, excludes such ideas as Socrates, Claim, Immunity, Privilege (as a form of Power), Power, Duty, Disability, Inability, and



Liability. It is a non-jural concept. The law does not and can not deal with it.<sup>9</sup>

(2) *Not-Duty*. Duty is a definite juristic idea. It is also ultimate. It means any act constrained in favor of another. *Not-Duty* is an indefinite idea. It excludes *only* the idea of Duty. *Not-Duty* logically might include Socrates, Liberty, Claim, Immunity, Privilege (as a form of Power), Power, Disability, Inability, Liability. In a word it includes the whole universe with the single exception of Duty.<sup>10</sup>

(3) *Not-Duty-To*. A duty-to (perform) is definite. A not-duty-to (perform) is indefinite. It excludes only the idea of duty-to (perform). It may logically include any idea other than a posited duty, i. e., Liberty, Claim, Immunity, Privilege (as a form of Power), Power, Disability, Inability, Liability. It might even include a duty of opposite content to the duty posited or might include some other duty. Thus, the landowner may owe *no* duty to go on his land and yet owe a duty to stay off the land.

(4) *Not-Duty-Not-To*.<sup>11</sup> A duty to perform is positive in

<sup>9</sup> Professor *Corbin* says: "It is not possible to furnish proof that constraint is necessary to the existence of a legal relation": "What Is a Legal Relation?" (1922) Ill. L. Quar. 5:52. Prof. Corbin has much to say in his writings of the "predictable conduct of societal agents." It is interesting to observe that Prof. Corbin has discovered Society. Many lawyers, especially those of the old régime, do not yet know it exists. We have hope that in time Prof. Corbin will re-discover the State. Concerning the statement made by Prof. Corbin it may be asked whether Prof. Corbin has ever in his researches met a relation on which a court has acted in an adjudicative capacity which did not involve constraint. Unless we are wholly misinformed no such instance can be found. If, provisionally, it will be admitted that no such instance is recorded, then having in mind the uncounted and uncountable numbers of times that courts have acted in an adjudicative capacity, the question arises whether on the mathematical formulas applied to such cases the probability of constraint has not become virtual certainty.

<sup>10</sup> Professor *Green's* comment (quoted by Prof. Goble, Ill. L. Quar. 5:45 n. 22) on universal negatives is sound, but the difficulty is to know precisely what is the field of reference. The present writer has never argued against the Hohfeldians that no-duty was *intended* to include Socrates or the German kaiser. No-duty may not be intended to include Socrates, but does it exclude Power?

<sup>11</sup> From this point, any variation of the formula would simply be a multiplication of Nots to qualify either (a) the duty or (b) the act which is the content of the duty. Thus one might find such uncouth combinations as Not-Duty-Not-To-Not \* \* \* or Not-Not-Duty-Not-Not-To \* \* \*.

*form*; it may be positive or negative in *content*. A duty to stay off land is positive in form and negative in content. A duty not to go on land is negative in form and negative in content. A duty not to stay off land is negative in form and positive in content. A duty not to do an act is as definite as a duty to do an act. The difference is only one of form. But a *not-duty-not-to* do an act is indefinite. It excludes only the idea of duty not to. Logically it may include any idea other than the negative of the act posited. It may, therefore, include Liberty, Claim, Immunity, Privilege (as a form of Power), Power, Disability, Inability, Liability. It might even include a duty to do the act posited or it might include some other duty.

## II

The distinction between Duties-Not and Not-Duties is as wide as the ocean. The Hohfeldians seem to decline to notice the distinction. What is original in the Hohfeld system of juristic terminology is based on mere negation. A stranger in a city asking a crossing policeman to be directed to the Union Station who should be answered that it is not at the North Pole would regard the answer a sorry jest, but yet the Hohfeld system operates in just that fashion. No art or science can operate with pure negation. The not-duties are not operable in the intermediate stages of legal analysis. They can not be made the basis of a table of categories. The question is not, as Professor Clark suggests, "Does it work?" but, How does it work? It must not be forgotten that prior to 1913 when Hohfeld originated his system, our law had been working for some seven centuries with such words as Right, Duty, Obligation, Immunity, Privilege, Exemption, Power, Liability, Responsibility, and Disability. If Privilege may be used as a generic synonym for Duty, Power, and Liberty, the Hohfeld system will work but it will work badly. The system that includes it will be an illogical system in so far as it purports to be a system of *ultimate* (i. e., exclusive, i. e., non-overlapping) terms, and it will fail to achieve the one great object sought—a table of *ultimate* juristic ideas.

The debate about the Hohfeld system is not simply one of nicety in the application of formal logic. It is not a matter of scholasticism comparable to the medieval problem of how many angels can stand on the point of a needle. The debate is architectonic in its consequences.<sup>12</sup> One of the greatest problems that confronts the jurist of this age is the restatement of our law. That restatement must be in words. The restatement of our corpus juris must rest on an ultimate basis of sound juristic terminology. This is not an idle debate. The issues do not rest on complaisance. If they did, the present writer would long ago have yielded out of respect for the memory of an ancient friendship. It is not a question of more and less or of degree. The Hohfeld tables are juristically and logically sound or they are not. On that issue they must be annihilated or they must by their own logical merit annihilate the opposing view. There is no need to leave "to experiment and to experience," as Professor Corbin suggests, the soundness of a system which can be demonstrated unsound without experiment. We do not need to fall out of the window to be convinced of the probable result of such an event.

### III

One of the valuable results attained by the recent discussion by Professors Clark, Goble, and Corbin is that the term privilege is fixed with an invariable meaning. Of the four possible meanings above suggested, the last is selected as the true one by Professor Clark and by Professor Goble. The present writer has heretofore supposed that Liberty was the term that Professor Hohfeld would have selected as the synonym for his Privilege if the difficulties and objections which have been ventilated, had been brought to his notice, as the term of least resistance to the

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<sup>12</sup> The present writer agrees entirely with all that has been said of the value of a sound terminology for accurate legal analysis. Professors Hohfeld, Corbin, and Cook, especially, have rendered legal science a service which is everywhere bearing fruit in their clear and forceful insistence on fundamental analysis. It is, of course, regrettable that the basis of such analysis still remains in doubt.

criticisms offered. Professor Hohfeld himself said: "The closest synonym for legal 'privileges' seems to be legal 'liberty' or legal 'freedom.'" <sup>13</sup> His discussion of the term is very indefinite as a whole. He seems to pass from one meaning (of the four above enumerated) to another without observing that the remainder of his terms might be affected by such variations. Since Hohfeld has passed from his earthly 'Begriffshimmel,' it is right that those who have the burden of supporting his ideas should have the liberty to state what those ideas are. Professor Clark has furnished a concise formula of Privilege in Not-Duty-Not-To.<sup>14</sup> It is true that he proposes it with an interrogation, but Professor Goble's argument is based on some such formula <sup>15</sup> and he relies on what seems an authoritative passage in Professor Hohfeld's famous essay.<sup>16</sup> The present writer therefore accepts the solution given.

Had Privilege been formulized as Not-Duty and had it been allowable to say that one has a privilege to perform his duty, there would have been a head-on collision of words and ideas. In that case, one's Duty would be a Not-Duty.

Professor Goble has constructed an interesting concatenation <sup>17</sup> to show that where *O*, an owner of land, has made a contract with *S*, to stay off his (*O*'s) own land, then *O* has a duty to stay off and also a Not-Duty-Not-To stay off. Shades of Austin, Bentham, Bierling, and Hohfeld! Do we need to be told that that where there is a duty to do a thing there is no duty not to do it? Clearly, Privilege as a Not-Duty-Not-To is an inclusive synonym for duty. If Not-Duty-Not-To is honest in its words it also includes Power. If *A* has a power of appointment to divest *B*, *A* owes No-Duty-Not-To exercise the power of appointment. Liberty likewise is a privilege; and of course, Privilege in the strict sense is also a Privilege in the wider Hohfeldian sense.<sup>18</sup>

<sup>13</sup> "Fundamental Legal Concepts," p. 47.

<sup>14</sup> "Relations, Legal and Otherwise" (1922) Ill. L. Quar. 5:29.

<sup>15</sup> "Negative Legal Relations" (1922) Ill. L. Quar. 5:48.

<sup>16</sup> "Fundamental Legal Concepts," p. 38.

<sup>17</sup> Illinois L. Quar. 5:48.

<sup>18</sup> Professor Goble asks the interesting question: When does a privilege cease to be a privilege and become a liberty in the successive stages of

To the present writer the above facts are simply fatal to the Hohfeld System. What we want to know is, what are Claim, Duty, Immunity, Disability, Privilege, Inability, Power, and Liability? We get little or no information from Not-Duty, Not-Duty-To, Not-Duty-Not-To. The method is wrong and the solution is wrong.

It is perfectly true that if there is a duty to stay off land there is not in the same reference a duty to go on. The first excludes the second, but there might be no duty to go on and still be no duty to stay off either. The statement of duty tells all that we need to know; the statement of the negative tells us nothing worth while. It is the case over again of the man seeking the Union Station and being told that it is not at the North Pole. It might be at the South Pole or perchance in Afghanistan. Furthermore, we seriously doubt whether in the whole span of our legal system any lawyer or judge in any reported case has reasoned his problem in such oblique fashion as the following: "No-Duty not to stay off equals no-duty to go on." The proposition is true, but we doubt the use of it in legal analysis.

Professor Goble has saved the Hohfeld system from a head-on collision. It seemed to be a case of a single track with two engines of a freight train approaching each other at full speed. Professor Goble has proved to the present writer's satisfaction that in fact both trains were moving in the same direction, but that one train was going backward. It was a case of duty to stay off and no duty to go on. The present writer admits the logical demonstration, and he acknowledges the skill of it. It only remains now to see if the train running backward does not collide at the rear end. Has Professor Goble avoided a rear-end collision of ideas? The Hohfeld correlatives now read:

No-Right: No-Duty-Not-To.

It will be admitted, we think, even by the most partisan Hoh-

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license, grant of right of way, lease, grant of life estate, and grant of fee simple? We believe that the privilege becomes a liberty at that point in the scale where the specific use becomes merged in an undefined (as to use) totality of uses. We should therefore fix the point of origin at lease and after grant of right of way.



feldian that this combination as it stands is not precisely an attractive one, but if it is accurate it may be recalled that Not-Duty-Not-To has a substitute in Privilege. We are not sure that it will be easily remembered, but it may be retorted that the numerical value of  $\pi$  is not easy to remember either. We see nothing in the point except inconvenience.

We may now turn our attention to the caboose of the backward moving freight train. In the example stated above, *O* has a duty to stay off his land; he also has a privilege to stay off. *S* seems to have a *right* that *O* shall stay off (correlative to *O*'s duty). He (*S*) *seems* also to have a *no-right* that *O* shall stay off (correlative to *O*'s privilege). That at any rate is the way the correlation reads. Here Right and No-Right seem to be the same thing; in any event they coincide. It is perfectly apparent that there is a fallacy in the proposition and we insist only that that is the way the correlation reads in the Hohfeld table as published. The addition of one or more 'nots' no doubt will untie the dilemma, but that requires an amendment of the Hohfeld table that will destroy it. After amendment it will no longer be Professor Hohfeld's table nor do we believe that he would accept it. Thus it is that the intruder ejected at the front door suddenly reappears at the back door. He is a logical ghost who will never go away until his bones are properly buried.

In this connection we have curiosity to know how the Hohfeldians treat such cases as privileged libel or negligence with contributory fault.

As we understand the state of the law, there is no immunity from action in privileged libel unless the privilege is pleaded. Is there a privilege to commit the libel? Tested by the formula Not-Duty-Not-To the answer must be No, because there is a duty not to commit any libel whether privileged or not. There is only an immunity against action for such a libel if the immunity is procedurally asserted. Strangely enough, where a libel is not privileged, the Hohfeldians do not concede to a dominus of a right of reputation, a legal immunity from the wrongful act—further proof of the illogical character of the system.

Again, in those jurisdictions where a plaintiff need not negative by declaration his contributory fault and where the defense must

be made by plea, did the defendant have a privilege to be guilty of negligence?

Lastly, in the case of *lex minus quam perfecta* (i. e., where a juristic act is prohibited but where the law regards the act as valid if done), do the parties have a privilege to perform the act?

#### IV

One more point closely connected with the foregoing remarks may be touched upon briefly.

Professor Goble, speaking of Liberty, says the law allows the possessor "a liberty to do the act and also permits him not to do the act." Neither law, logic, nor mechanics, we think, permits both, if the acts are opposites. A man has no liberty to go on his land and to stay off in the same reference. He may do both in different moments of time, but not by the same act of choice. In this, we believe, lies the explanation of Professor Goble's doctrine of the nature of a duty. In one of his series of propositions he says: "The contractual duty to stay off leaves unaffected his no-duty not to stay off" (i. e., no duty to go on).<sup>19</sup> We submit that if there is a duty to stay off, the pre-existing no-duty is not left unaffected. If it were left unaffected he might make a contract with the same person (*S*) to go on his land, in which case he would be found in the highly difficult position of owing to the same person at the same moment a duty to stay off and a duty to go on.<sup>20</sup>

#### V

While the Hohfeld system as a system must we believe be rejected as faulty in point of departure and as logically incongruous in execution, yet we regard the insistence upon the technic of legal relations as the operative link between legal rules and

<sup>19</sup> Illinois L. Quar. 5:48 (proposition 5).

<sup>20</sup> The Hohfeld Table of Correlatives is:

Right	Privilege	Power	Immunity
Duty	No Right	Liability	Disability

The literature which discusses the Hohfeld system has become voluminous. The following citations lead to most of the material. "Tabulae Minores Jurisprudentiae" (1921) Yale Law Jour. 30:215, n. 1; Comment

juridical phenomena as a step of major importance in legal analysis. Hohfeld and his able colleagues are entitled to full credit for the wide acceptance of that important program. It is, we are convinced, the most important practical step taken in this generation to make the law a science in fact as well as in name. So illuminating is that process in dealing with very difficult legal questions that even with such imperfect tools as are provided by the Hohfeld System an insight into legal problems is provided which is often wanting in attempting to reason directly from legal rules to juridical results. We believe, however, that the insight furnished to many of those who have testified to it is largely illusory and that the true insight is rather to the process itself which the Hohfeld System has imperfectly worked out.

Another important contribution we believe is the statement that a legal relation exists only between "two persons, neither more nor less."<sup>21</sup> This we think is a fundamental truth of the greatest importance.

Lastly, the assertion that the content of one legal relation may be precisely the same content for another legal relation, while perhaps not of far-reaching juristic importance, is a fact first formulated by the Hohfeldians<sup>22</sup> showing an acuteness of perception difficult to reconcile with the acceptance as a legal relation of the No-Power—No-Liability concept.

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(1922) Yale L. Jour. 32:157, n. 1. A few additional items are cited in the footnotes of the articles here under review: see footnote 1 ante. See, particularly, Handbook and Proceedings of the Association of American Law Schools 1920 which reports the plenary discussion of jural relations.

<sup>21</sup> Professor Corbin appears to be the first jurist to have clearly stated this important fact: "Legal Analysis and Terminology" (1919) Yale L. Jour. 29:165. Prof. Corbin, however, modestly gives credit for priority to Prof. Hohfeld and to Prof. Cook. Prof. Ernest Roguin had already in 1889 ("La Règle de Droit") emphasized that all legal relations are of two subjects—one, an "active subject" and the other, the "passive subject." In that work Prof. Roguin claimed for that formula originality and priority. Prof. Corbin's formula, however, goes farther in ultimateness and to that extent is an improvement on Prof. Roguin's formula. Prof. Roguin's latest work (1923, "La Science Juridique Pure") does not show any advance at this point over his earlier view of the nature of a jural relation.

<sup>22</sup> Since a controversy of this kind does and should clear the ground perhaps chiefly for those who engage in it, the present writer makes the

As a last word in the present stage of the discussion we find it difficult to understand the inflexibility of the Hohfeldians in insisting on the existence of non-legal-content (non-constraint) relations when it is possible to reform the Hohfeld System by a single substitution of terms.<sup>23</sup> This change, if accepted by the Hohfeldians would conform to the prevailing opinion in the juristic world<sup>24</sup> and would give the legal profession a terminology sound in theory, practical in application,<sup>25</sup> and agreeable to the usages of professional discourse.<sup>26</sup>

acknowledgment that he did not clearly see this point until very recently, although it has constantly been urged by Prof. Cook. The writer finds that it is quite as important a truth in his own formulation of legal relations of the constraint type as for the Hohfeldians.

<sup>23</sup> This single alteration would be the substitution of "inability" for "no-right" where the correlatives would be privilege-inability. Simple as this change is in external appearance, it involves a profound change in theory. The change would affect the category immunity-disability giving it a radically different meaning. The theoretical departure is what the Hohfeldians resist. That being the case the theory must be justified. It has no support among continental jurists so far as we are able to ascertain. Cf. the remarks on the proposed substitution in "Tabulae Minores" (1921) Yale L. Jour. 30:215 (225, n. 19).

<sup>24</sup> Cf. Windscheid "Lehrbuch des Pandektenrechts" 9th ed., 1906 (Kipp Ed.) §§ 27, 30 and especially the footnote references; *Del Vecchio* "Formal Bases of Law" (Lisle's tr.) p. 179.

<sup>25</sup> The substitution would fix the term Privilege with one meaning in accordance with professional usage and would emancipate the word Liberty which the Hohfeld System seeks to abolish. The Hohfeldians insist that the aborted use of Privilege, since it may mean Liberty, Duty, Power, and Privilege (strict sense) has great utility. If a word is wanted to express the meaning of Not-Duty-Not-To we submit that a glance at Roget will suggest several that do not have the demerit of mutilating our professional language as does the Hohfeldian Privilege. That want, however, is not one which finds any expression in a table of legal relations and the assertion of it for a table of legal relations shows a complete misapprehension of the nature of a legal relation. A legal relation must be a single, definite, and ultimate legal idea. It may be repeated that there are only two such unique and ultimate relations—the Claim-Duty relation and the Power-Liability relation.

<sup>26</sup> Further discussions of juristic terminology have been published by Prof. Frederick Green ("The Relativity of Legal Relations," Ill. L. Quar. 5:187 June 1923), and more recently by Prof. George W. Goble ("Terms for Restating the Law," A. B. A. Jour. 10:58, Jan. 1924), and still more recently by Prof. Isaac Husik ("Hohfeld's Jurisprudence," Penn. L. Rev. 72:263, March 1924). See, also, *Commons* "Legal Foundations of Capitalism" (Macmillan Company, 1924). [The following additional items may now be entered: Randall (H. J.) "Hohfeld on Jurisprudence" Law Q. Rev. 41:86 (1925); Radin "L'analisi dei rapporti giuridici secondo il metodo di Hohfeld" Rev. Int. d. Fil. del Diritto 7:117 (1927).]

## GLOSSARY

### A

**ABNORMAL CONCATENATION:** a chain of jural relations which involves an adjunction of an unlawful act.

**ABNORMAL INTERCALATION:** intervention between two zygnomic relations of a mesonomic relation whose evolution is an unlawful act.

**ABSCINDABLE RELATIONS:** mesonomic relations uniform in jural incidence as to one (or several) but subject to be destroyed by contingently polarized powers. They are transpositive forms of Rescindable Relation (q. v.).

**ACCESSORY RELATION:** a jural relation whose existence depends on the existence of another relation.

**ACCRESCENCE:** the jural process by which a mesonomic relation is converted into a zygnomic relation by flow of time.

**ACCRESCENT RELATIONS:** mesonomic relations which are converted into zygnomic relations by flow of time.

**ACTING:** the series of physical motions leading from a given center of force (whether animate or inanimate) to an objectively ascertainable result.

**ACTION:** acting considered in an abstract meaning.

**ACTIVE LIGATIONS:** ligations in which the jural motion is that of the servus: duty and disability.

**ACTIVE RIGHTS:** rights in which the jural motion is that of the dominus: power and privilege.

**ACTS:** used in three senses: (1) physical acts; (2) legal acts; (3) jural acts. Each of these may have three meanings: (a) reflexes of living organisms (*lato sensu*); (b) presence or absence of reflexes of human beings (*stricto sensu*); (c) positive results of human reflexes (*strictissimo sensu*).



**ADJUNCTION:** neither jural relations nor jural facts are adjoined, but jural facts which are involutive or evolutive may be regarded as adjoined to their respective jural relations.

**ALLOPHYLAXIS:** where a jural relation serves only to protect another jural relation (e. g., power of suit).

**ALTERATION:** the jural process by which a jural relation is modified in its jural content without destruction or degeneration.

**ALTERATIVE CONDITIONS:** where in a jural complex the jural results of evolution are different.

*Example:* a debtor has a simple power to pay his debt and he has also a simple power to not pay his debt. The evolution of these powers has different legal results.

**ALTERATIVE RELATIONS:** mesonomic relations whose evolution alters the jural quality of other relations.

**AMORPHOUS RELATIONS:** relations of a continually changing content or indefinite in content.

**ANOMIC RELATIONS:** non-jural relations.

**ATTRACTION:** the quality of being the directional center of a jural act; the dominus of a duty and the servus of a power attract to themselves the relational act.

**AUTHORITY:** the common denominator for Claim and Power; the negative by conversion of Disability and Inability.

**AUTOMATIC SANCTION:** a sanction which is imposed by law immediately on the breach of a duty, without executive force.

**AUTOPHYLAXIS:** where there is a self-protecting jural relation (e. g., right of keeping possession).

## B

**BIACTIVE INTEGRAL CONFLICT:** occurs when two claims or two powers jurally collide through a bilateral assertion of them.

## C

**CAPABILITY:** the concrete expression of Capacity as manifested by actual rights but not of ligations. There is a capacity for ligations but a ligation is not a capability.

*Syn.* Legal advantage.

**CAPACITY:** the jural quality of personateness; the substrate of jural personality; the basis of rights and ligations.

**CAUSAL RELATIONS:** those pre-intervenient relations which by evolution proximately generate new jural relations.

**CLAIM:** a special variety of Right; a capability to require another to perform a positive or negative act. Its correlative is Duty.

**CONDITIONING RELATIONS:** relations dependent in evolution or in alteration of jural quality upon an external act.

**CONFLICTIVE RELATIONS:** conjunctive jural relations where the domini are different legal persons. There are two kinds of jural conflict: (1) logical and (2) integral.

**CONGRUENT RELATIONS:** conjunctive relations in which the domini or the servi or both are the same respective legal persons.

*Example:* two dependent duties owing by the same servus to the same dominus.

**CONJUNCTIVE RELATIONS:** plurinary relations which are inter-related in such a way that the resolution of one in some jural way affects the other.

**CONSTRAINING ACTS:** acts which create zynomic relations.

**CONTENT:** the act involved in a jural relation; it may consist of duty or disability or of power or privilege.

**CONTINGENCY RELATIONS:** relations contingent in evolution or in the possibility of alteration of jural quality depending on an event.

**CONVERGENCE:** where in conjunctive jural relations the directional act points to the same legal person (e. g., two conjunctive duties or two conjunctive powers pointing to the same legal person).

**CONVERSION:** there are three forms: (1) c. by reciprocation (e. g., claim into immunity); (2) c. of or into intermediate negatives (e. g., no-claim—debility, no-authority—debility); (3) juristic conversion: transformation of the negative of one specific term into another specific term (e. g., no-inability—claim). Only the first two forms are practically useful.

**COURT**: a governmental agency which in the strictest sense functions only to impose a sanction for a breach of duty. In a wider sense, courts also perform the administrative work of investigating the grounds upon which sanctions are imposed. In a yet wider sense, they exercise various administrative and legislative functions.

**CORRELATIVE**: a term or idea necessarily connected with another term or idea and logically consistent with it.

*Example*: claim and duty.

## D

**DEBILITY**: the common denominator for Disability and Inability; the negative by conversion of Claim and Power.

**DECLARATORY REMEDY**: a restatement of a duty in an official and authoritative form without further governmental intervention. There are four forms: (1) repetitive declaration; (2) excluding declaration; (3) constitutive declaration; (4) abrogative declaration.

**DECRESCENCE**: the jural process by which a zygnomic relation is converted into a mesonomic relation by flow of time.

**DECRESCENT RELATIONS**: relations reduced in jural quality from zygnomic to mesonomic by flow of time.

**DEFENSIVE RELATIONS**: relations which can not be evolved offensively but which may be evolved defensively.

**DEGENERABLE RELATIONS**: relations which may be reduced in jural quality from zygnomic relations to mesonomic relations by jural acts. When so reduced such relations become Degenerated Relations.

**DEGENERATION**: the jural process by which a zygnomic relation is converted into a mesonomic relation by a jural act.

**DEPENDENT RELATIONS**: plural relations interrelated by (1) involutive facts or (2) evolutive facts.

**DESCRIPTIVE RELATIONS**: relations which have certain distinguishing qualities considered as relations apart from their evolutive effects on other relations.

**DEVOLUTION**: destruction of a jural relation other than by evolution; abnormal destruction of a jural relation.

**DISABILITY:** a special variety of ligation; the reciprocal of Duty; the lack of authority to project a positive or negative act against another. Its correlative is Immunity.

**DISCRETIONARY RELATIONS:** relations whose evolution can not be required or can not be required in specific content.

**DISJUNCTIVE RELATIONS:** plurinary relations coexisting where the resolution of one has no jural effect on the other.

**DIVERGENCE:** where the directional act points to different legal persons.

*Example:* the owner of a chattel has the simple power to abandon it; the directional jural act (power act) points from one dominus to all other legal persons (servi).

**DOMINUS:** the legal person who dominates or controls a Right.

**DUTY:** a special variety of Ligation; a responsibility to perform a positive or negative act for the legal advantage of another. Its correlative is Claim.

**DUTY-POWER:** a power exercised to effect a duty. Duties as such can not be evolved, i. e., can not be performed, since the servus of a jural relation can not act against the dominus. Duties are destroyed by means of duty-powers.

## E

**ECTOPHYLACTIC RELATION:** a jural relation which serves to protect another jural relation (e. g., power of self-defense).

**ELECTIVE RELATIONS:** are of two classes: (1) prelative relations and (2) sublative relations.

**ENDOPHYLACTIC RELATION:** a jural relation which is protected by another jural relation (e. g., ownership of a chattel as protected by a power of recaption).

**ESTOPPEL RELATIONS:** mesonomic relation in which the dominus is under a disability to assert the relation procedurally.

**EVOLUTION:** performance of the act which is the content of a legal relation. The act is said to be 'evolved.' The evolved act is a jural act. Powers are the only relations that can be evolved, since there is no possibility of evolving a duty except by means of a power to perform the duty. Events are not evolved because they are never the content of legal relations.

EXECUTIVE SANCTION: a sanction not imposed automatically by law but requiring an act of choice.

EXEMPTION: the common denominator for Immunity and Privilege; the negative by conversion of Duty and Liability.

EXTERNAL DEVOLUTION: destruction of a jural relation by a supervenient jural fact (e. g., impossibility of performance).

## F

FRANGIBLE RELATION: a jural relation that may be violated. Only duties are frangible, but some duties are theoretically infrangible. Powers are always infrangible.

FREEDOM: objective choice of alternatives; the external side of Liberty. The law begins where freedom ends; and contrariwise, the law ends where freedom begins.

FUNCTIONAL RELATIONS: relations whose evolution create, destroy, intercalate, or alter other jural relations.

## G

GENERAL NEGATIVE: the simple negation by the word 'no' or 'not' of a specific right or ligation. It may be 'ultimate' or it may be 'universal.'

*Example:* the general negative of 'Duty' is 'no-Duty.'

## H

HETERADIC JURAL CONFLICT: exists where a third legal person is involved in the conflictive complex.

HETERADIC RELATIONS: plural relations in which more than two legal persons are involved.

HETEROGENOUS RELATIONS: plural relations which arise from different jural facts.

HETEROLOGOUS RELATIONS: plural relations which are dissimilar in form or in arrangement.

HETEROMERAL RELATIONS: plural relations which are unlike in polarity, form, arrangement, or origin.



**HETEROMORPHIC CONFLICT:** where two dissimilar basic relations are in conflict.

**HETEROMORPHIC RELATIONS:** plural relations where the jural forms (claim, power, etc.) are different.

**HETEROPHYLAXIS:** where a jural relation is self-protecting and at the same time protects another jural relation (e. g., usufructuary pledge).

**HETEROTAXIC RELATIONS:** plural relations in which the jural arrangement is different, where the legal persons involved are the same legal persons (e. g., where the dominus of one relation is the servus of the other).

**HOMADIC JURAL CONFLICT:** Exists where the same two legal persons represent the polarity of the conflictive complex.

**HOMADIC RELATIONS:** plural relations in which the same legal persons are involved in each relation.

**HOMOGENOUS RELATIONS:** plural relations which arise from the same jural fact.

**HOMOLOGOUS RELATIONS:** plural relations which are similar in form and in arrangement though dissimilar in polarity or origin or both.

**HOMOMERIAL RELATIONS:** plural relations which are similar in polarity, form, arrangement, and origin.

**HOMOMORPHIC CONFLICT:** where two similar basic relations are in conflict.

**HOMOMORPHIC RELATIONS:** plural relations where the same jural form (claim, power, etc.) is involved.

**HOMOTAXIC RELATIONS:** plural relations where the same legal persons are involved and in which the arrangement is similar, i. e., where the dominus of one relation is the dominus of the other.

## I

**IMMUNITY:** a special variety of Right; the reciprocal of Claim; a capability of repelling a positive or negative act of another. Its correlative is Disability.

**INABILITY**: a special variety of Ligation; the reciprocal of Liability; the debility to require a positive or negative act from another. Its correlative is Privilege.

**INCEPTIVE RELATIONS**: mesonomic relations that are preliminary to the creation of zygnomic relations. There are two kinds: (1) those based on lawful acts and (2) those based on unlawful acts.

**INDEPENDENT RELATIONS**: plural relations not interrelated by involutive or evolutive facts.

**INEFFECTIVE ACTS**: acts which create jural relations which are subject to regeneration.

**INEFFECTIVE RELATIONS**: mesonomic relations subject to be regenerated.

**INFORMAL RELATIONS**: mesonomic relations defective as zygnomic relations in the absence of an element of form.

**INFRA-JURAL RELATION**: the factual relation which is the object of a jural relation, i. e., which will be realized by evolution of a jural relation; also a factual relation which is protected by a jural relation (e. g., possession). See Jural Thing.

**INFRANGIBLE RELATIONS**: jural relations that may be violated. Powers and some duties are infrangible.

**INTEGRAL CONFLICT**: occurs without logical opposition where the resolution of one jural relation has a destructive or degenerative effect on another. There are two kinds: (1) uniactive and (2) biactive integral conflicts.

**INTEGRAL REDRESS**: protection of the identical relation which has been threatened, or reinstatement where it has been violated. The forms are: (1) restraint; (2) compulsion; (3) restitution; (4) official declaration.

**INTERCALARY RELATIONS**: mesonomic relation that intervene in a chain of two zygnomic relations. There are two forms: (1) abnormal intercalation; (2) normal intercalation.

**INTERCALATION**: the jural process by which one zygnomic relation is succeeded by another by means of evolution of an intervening mesonomic relation.

**INTERNAL DEVOLUTION:** destruction of a jural relation by contrary act.

*Example:* a duty is destroyed by an act contrary to the duty; if there is a duty to pay, there may be breach of the duty by failure to pay.

**INTRODUCTORY RELATIONS:** are preliminary jural relations that lead (a) to normal concatenations or (b) to abnormal concatenations.

**INVOLUTION:** signifies that a jural act is potentialized in the form of a jural relation. The involved act is the content of the jural relation; it is the product of a jural fact (act or event). Duties may be 'involved' but may not be 'evolved.' Events are never 'involved' (i. e., never become the content of a jural relation).

## J

**JURAL ACT:** the jural concept of the proximate cause of the creation, alteration, or destruction of a jural relation.

**JURAL CONTRARIES:** logical opposition between dominant processive and attractive functions or between dominant recessive and repulsive functions. Thus, power and claim and privilege and immunity, respectively, are jural contraries.

**JURAL NEGATIVES:** logical opposition between dominant attractive and recessive functions or between dominant processive and repulsive functions. Thus, power and immunity and claim and privilege, respectively, are jural negatives.

**JURAL OPPOSITION:** consists of logical opposition (a) by contraries and (b) by negation. Claim and immunity on one side and power and privilege on the other, are in logical opposition.

**JURAL RELATION:** the conceptual fact of domination of the (legal) personality of one person in favor of another. The term is used interchangeably with 'legal relation'; the proper distinction is that a 'legal relation' is a concrete relation while a 'jural relation' is a legal relation considered abstractly. Courts deal with legal relations; while jurists and theorists deal with jural relations.

**JURAL THING:** The object of a jural relation. This term is nearly equivalent to *Infra-Jural Relation* (q. v.).

**JURISTIC CONVERSION:** the logical process of reducing the general negative of a specific right or ligation into another specific right or ligation. This process probably has no practical use.

## L

**LEGAL ACT:** an objective result which the law considers sufficient for the creation, alteration, or destruction of rights. This meaning includes unlawful acting.

**LEGAL RELATION:** the concept abstracted from a situation of legal fact (sovereignty and legal rules) and of material fact (a governmental system and facts occurring in social life) by virtue of which one person, presently or contingently, and directly or indirectly, may control the range of natural physical freedom of a human being in favor of another person with the support of the law.

**LIABILITY:** a special variety of ligation; the responsibility to suffer a positive or negative act of another. Its correlative is Power.

**LIBERTY:** subjective choice of alternatives; the law does not deal with it.

**LIGATION:** the generic term for the servient side of a jural relation; it includes duty, disability, liability, and inability; it excludes such terms as no-duty and no-liability since they are not relational in a jural sense.

**LOGICAL CONFLICT:** exists when there is jural opposition as to the same act in two coincident jural relations. Logical jural conflict may exist between claim and immunity and power and privilege.

## M

**MESONOMIC:** *mésos* = middle + *nómos* = law.

**MESONOMIC RELATION:** a jural relation which does not directly affect the natural physical freedom of a human being with the support of the law but yet which has legal consequences in its evolution (q. v.) or which may be converted into a zygnomic relation or which in a jural series may result in a zygnomic relation or which in form resembles a zygnomic relation.

## N

**NAKED:** this term is used to qualify the ability of a human being to do a physical act in an anomic relation.

*Example:* a mendicant has a naked claim to receive alms; a stranger to a title has a naked power to execute a deed of land.

**NEGATIVE ACT:** a result not directly connected in a physical chain of sequences with the bodily motions of a human being.

**NEXAL:** a term to qualify the capability or constraint of any specific zynomic relation.

*Example:* a creditor has a nexal claim against his debtor; the debtor owes a nexal duty to pay.

**NOMIC RELATIONS:** there are two groups: mesonomic and zynomic relations:

*Syn.* Jural relations, legal relations.

**NON-CONSTRAINING ACTS:** acts which create preliminary mesonomic relations which are not susceptible of regeneration.

*Example:* offer of contractual relation.

**NON-LEGAL-CONTENT RELATIONS:** anomic relations or general negatives of nomic relations not reduced to specific jural relations.

*Example:* no-right—no-duty is a general negative; in that form no jural character can be affirmed of it.

**NON-SANCTIONAL INTEGRAL CONFLICT:** where the conflict is not based on a breach of duty.

**NORMAL CONCATENATION:** a chain of jural relations which does not involve an adjunction of an unlawful act.

**NORMAL INTERCALATION:** intervention between two zynomic relations of a mesonomic relation whose evolution is not an unlawful act.

## P

**PASSIVE LIGATIONS:** ligations in which the jural motion is that of the dominus: liability and inability.

**PASSIVE RIGHTS:** rights in which the jural motion is that of the servus: claim and immunity.

**PERSONA:** legal person; any entity to which the law attributes a capacity for legal relations.

**PERSONALITY:** the sum total of the rights and ligations of a legal person (*persona*).



**PERSONATENESS**: the quality of being a legal person, i. e., of having capacity for jural relations.

**PHYLACTIC RELATIONS**: relations which protect or are protected by other relations.

**PHYSICAL ACT**: the physical origin or condition of an objectively ascertainable result: (a) connected in a causal chain with the movements of the human body; (b) attributable by causal negation to the absence of movements of the human body.

**PLURINARY RELATIONS**: complexes of unitary relations arising out of one or more jural facts (e. g., agency, suretyship, bi-promissory contracts, partnership).

**POLARITY**: referring to the legal persons who represent the poles of a jural relation consisting of a dominant pole (e. g., claim) and a servient pole (e. g., duty).

**POLARIZED RELATIONS**: where the essential investitive jural facts directly identify the legal persons who represent the polarity of jural relations. This term is used as a substitute for the misleading and unscientific expression 'rights in personam.'

**POLE**: the dominant or servient element of a jural relation. Each jural relation has two poles (i. e., it is dypolic). Plurinary complexes consist of classes of couples; there can be, therefore, no three-pole complex. The arrangement is dypolic, tetrapolic, etc.

**POLYADIC RELATIONS**: plurinary complexes composed of plural legal persons. A unitary relation is dyadic. If three legal persons are involved in the complex it is a triadic complex.

**POLYPOLIC RELATIONS**: plurinary complexes composed of plural jural poles counted always in couples.

**POSITIVE ACT**: a result directly connected in a physical chain of sequences, with the bodily motions of a human being.

**POSTINTERVENIENT RELATIONS**: those relations in the same jural chain which follow other given relations.

**POSTSUPERVENIENT RELATIONS**: those relations not in the same jural chain which follow in order of occurrence other given relations.

**POSTVENIENT RELATIONS:** those which in order of occurrence follow other given relations.

**POWER:** a special variety of Right; authority to project a positive or negative act against another. Its correlative is liability.

**PREINTERVENIENT RELATIONS:** those relations in the same jural chain which precede other given relations.

**PRELATION:** the effect of election of one jural relation which at the same time results in the abandonment of another.

**PRESUPERVENIENT RELATIONS:** those relations not in the same jural chain which precede in order of occurrence other given relations.

**PREVENIENT RELATIONS:** those which in order of occurrence precede other given relations.

**PRINCIPAL RELATION:** a jural relation upon which another (accessory) relation is dependent for its existence.

**PRIVATE SANCTION:** a sanction executed by private force.

**PRIVILEGE:** a special variety of Right; the reciprocal of Power; authority to decline a positive or negative act in favor of another. Its correlative is Inability.

**PROCESSION:** the quality of uninterrupted direct motion of an act from one jural pole to another. Duty and power are processive.

**PROGRESSIVE RELATIONS:** attractive and processive rights or ligations: claim and duty; power and liability.

**PROZYGNOTIC RELATIONS:** mesonomic relations which by evolution and with the approval of the law directly create zygnotic relations.

*Examples:* power of offeree to accept an offer; power of a lessor to forfeit a lease; power to rescind. Usually the same dominus is found in both relations, but the domini may be different as in the exercise of a power to appoint land to another.

**PUBLIC SANCTION:** a sanction executed by state force.

## R

RECESSION: the quality of starting a relational act in an opposite direction; the dominus of a privilege and the servus of a disability are the jural centers of directional motion toward the other jural pole by reciprocatation.

RECIPROCALLS: claim and immunity, duty and disability, power and privilege, liability and inability, respectively.

RECIPROCATING CONDITIONS: where the evolution of either one of two relations of equal jural rank is the condition of the involution of a new jural relation.

RECIPROCATATION: conversion of a jural relation by change of sign (+ or —).

*Examples:* Claim and Immunity or Power and Privilege are mutually convertible by change of sign. The convertible relations are always homotaxic (q. v.).

REDUCTIVE RELATIONS: relations which are reduced in jural quality by degeneration or by descrecence.

REFECTION: the jural process by which a mesonomic relation is converted into a zygonmic relation. There are two forms: (1) regeneration; (2) accrescence.

REFECTIVE RELATIONS: relations which may be elevated in jural quality by regeneration or accrescence.

REGENERABLE RELATIONS: mesonomic relations which are convertible into zygonmic relations by jural acts. The term does not connote precedent degeneration.

REGENERATION: the jural process by which a mesonomic relation is converted into a zygonmic relation by a jural act.

REGRESSIVE RELATIONS: recessive and repulsive rights or ligations: immunity and disability; privilege and inability.

REMEDIAL ANALEPSIS: intervention of the state for violations of duty by means of curative remedies.

REMEDIAL PROLEPSIS: intervention of the state by declaratory restraint or compulsion in anticipation of future violations of duty.

**REMEDIES:** the sanctions imposed for violations of duty. The forms are: (1) official declaration; (2) coercive declaration; (3) restitution; (4) compensation; (5) punishment.

**REPULSION:** the quality of reversing the direction of a relational act; the dominus of an immunity and the servus of an inability repel from themselves the relational act.

**RESCINDABLE RELATIONS:** mesonomic relations uniform in jural incidence as to all persons but one (or several) with a polarized power to destroy them.

**RESOLUTION:** the generic term to indicate the destruction of a jural relation; it has three forms: (1) evolution; (2) internal devolution; (3) external devolution.

**RESPONSIBILITY:** the common denominator for Duty and Liability; the negative by conversion of Immunity and Privilege.

**RIGHT:** the generic term for the dominant side of a jural relation; it includes claim, immunity, privilege, and power; it excludes liberty, freedom, and all general negations of ligation.

## S

**SANCTION:** an evil visited by the law resulting from a breach of duty. Sanctions are: (1) private and public; (2) automatic and executive; (3) specific and general; (4) intermediate and ultimate.

**SANCTIONABLE DUTY:** a duty which has a sanction. All frangible duties have sanctions.

**SANCTIONAL ACTS:** unlawful acts which are visited by a sanction.

**SANCTIONAL DUTY:** a duty which is the sanction for the breach of another duty.

**SANCTIONAL INTEGRAL CONFLICT:** where the conflict is based on a breach of duty. There are two kinds: (1) rescissive and (2) abscissive sanctional conflicts.

**SANCTIONAL POWER:** a power which is the sanction for the breach of a duty.

SCINDABLE RELATIONS: relations which are destructible by rescission or abscission.

SCISSION: the jural process by which a jural complex is destroyed. There are two forms: (1) rescission; (2) abscission.

SEQUENTIAL RELATIONS: those postintervenient relations which are generated proximately by the evolution of preceding jural relations.

SERVUS: the legal person who bears a Ligation.

SIMPLE: this term is used to qualify the capability or constraint of any specific mesonomic relation.

*Example:* the power of an offeror to make an offer is a simple power; the offeree bears a simple liability to have the offer made.

SOVEREIGN RELATIONS: relations of the state to its subjects or of the state to other states.

SUBCAUSAL RELATIONS: those preintervenient relations which by evolution remotely generate new jural relations.

SUBLATION: the effect of abandonment of a jural relation by the election of another.

SUBSEQUENTIAL RELATIONS: those postintervenient relations which are remotely generated by the evolution of preceding jural relations.

SUBSTITUTION: the jural process by which a jural relation in one legal person is destroyed and an equivalent relation in another legal person is created.

SUBSTITUTIONAL INTERCALATION: where the evolution of a mesonomic relation destroys a jural relation in one legal person and at the same time creates an equivalent legal relation in another legal person.

SUBSTITUTIONAL REDRESS: a sanction which does not protect a menaced claim and does not reinstate the claimant but which gives a substitute for the injury by way of compensation or punishment.

SUSPENDED RELATIONS: relations which have suffered degeneration by jural acts or events which do not create conflictive complexes.



## T

**TAXONOMY:** arrangement of the poles of jural relations. If the dominus of one relation is also the dominus of another and the servus of one relation is also servus of the other, the two relations are homotaxic. If the dominus of one relation is servus of the other, the relations are heterotaxic.

**TERMINAL RELATIONS:** mesonomic relations whose evolution destroy zygnomic relations without an ensuing abnormal concatenation. They are the contrary jural form of Inceptive Relations.

**TERMINATION:** the jural process by which a jural relation is destroyed without an ensuing abnormal concatenation.

**THING:** see Jural Thing.

**THING ELEMENT:** an irreducible element of a Jural Thing (e. g., space, force, matter, ideas).

## U

**ULTIMATE NEGATIVE:** a general negative which excludes the possibility of jural relation.

**UNCONSTRAINING ACTS:** acts which create mesonomic relations that may be abrogated or regenerated. There are two types: (1) voidable acts; (2) ineffective acts.

**UNIACTIVE INTEGRAL CONFLICT:** exists where one of two integrally opposed jural relations is active and the other is passive. There are two kinds: (1) sanctional conflict and (2) non-sanctional conflict.

**UNITARY RELATIONS:** jural relations that consist of one dominus, one servus, and one act. These are the jural atoms of legal analysis.

**UNIVERSAL NEGATIVE:** a general negative which neither implicates nor denies the possibility of an inferential jural relation.

**UNPOLARIZED RELATIONS:** where the essential investitive jural facts do not directly identify the legal persons who represent the polarity of jural relations. This term is used as a substitute for the misleading and unscientific expression, 'rights in rem.'

## V

VOIDABLE ACTS: acts which create jural relations which may be abrogated.

VOIDABLE RELATIONS: relations which may be abrogated by a conflicting power.

VOID ACTS: acts which do not create jural relations.

## Z

ZYGNOMIC: Zygón = yoke + nómos = law.

ZYGNOMIC RELATION: a jural relation which involves an act the evolution (q. v.) of which directly abridges, with the support of the law, the freedom of the servus in the enjoyment, actively or passively, of the substance of a legal advantage.

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